Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term 1998

RONALD A. BROWN,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. DID RESPONDENT BALTIMORE CITY'S AFFIRMATIVE ACTION PLAN, WHICH SETS EMPLOYMENT QUOTAS AND PREFERENCES FOR HIRING MINORITIES AND WOMEN IN UPPER LEVEL MANAGERIAL POSITIONS, WITHOUT A HISTORY OF PAST DISCRIMINATION, GIVE RISE TO A PRESUMPTION AND INFERENCE THAT IT WAS AN OFFICIAL REGULATION, CUSTOM, USAGE AND POLICY OF EMPLOYMENT DISCRIMINATION WITHIN THE MEANING OF 42 U.S.C. § 1981 AND § 1983, UNDER WHICH THE CITY COMPTROLLER ACTED, WHEN SHE PURGED WHITE MALES FROM UPPER LEVEL MANAGEMENT OF THE COMPTROLLER'S OFFICE OF BALTIMORE CITY IN ORDER TO EMPLOY MINORITIES AND WOMEN?

II. DID RESPONDENT BALTIMORE CITY'S AFFIRMATIVE ACTION PLAN, WHICH SETS EMPLOYMENT QUOTAS AND PREFERENCES FOR HIRING MINORITIES AND WOMEN IN UPPER LEVEL MANAGERIAL POSITIONS, WITHOUT A HISTORY OF PAST DISCRIMINATION, GIVE RISE TO A PRESUMPTION AND INFERENCE THAT IT WOULD BE A "FUTILE GESTURE" FOR THE PETITIONER, A WHITE MALE, TO REAPPLY FOR EMPLOYMENT, AFTER THE PETITIONER'S POSITION WAS ABOLISHED AND ELIMINATED FROM THE CITY BUDGET AND SIMULTANEOUSLY RE-CREATED IN SUBSTANTIALLY SIMILAR FORM, IN ORDER TO INCREASE THE NUMBER OF MINORITIES AND WOMEN?

LIST OF PARTIES

The parties are:

1. RONALD A. BROWN

2. THE MAYOR & CITY COUNCIL OF BALTIMORE[1]

3. JACQUELINE F. MCLEAN[2]

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[1] There is no parent or subsidiary company to be listed. The Mayor & City Council of Baltimore is the corporate name for the City of Baltimore; and, the City of Baltimore is the real party-in-interest. Baker v. Mayor & City Council of Baltimore, 894 F.2d 679,680 n.1 (4th Cir. 1990), cert. denied, 498 U.S. 815 (1990).

[2] Jacqueline F. McLean is not a party to the proceedings in this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

REFERENCE TO OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

PERTINENT CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

ARGUMENT 15

CONCLUSION 22

APPENDIX:

TABLE OF AUTHORITIES

CASES

Alexander v. Estepp,
95 F.3d 312 (4th Cir. 1996)
(applying Croson),
cert. denied, ___ U.S. ___,
117 S.Ct. 1425 (1997) 20

Bishopp v. District of Columbia,
788 F.2d 781 (D.C. Cir. 1986) ... 17

Brown v. McLean,
159 F.3d 898 (4th Cir. 1989) 1

Burtnick v. McLean,
953 F. Supp. 121 (D.Md. 1997) ... 11

Canham v. Oberlin College,
666 F.2d 1057 (6th Cir. 1981),
cert. denied
456 U.S. 977 (1982) 21

Cerrato v. San Francisco Community
College District,
26 F.3d 968 (9th Cir. 1994) 21

Christensen v.
Equitable Life Assurance Society
of the United States,
767 F.2d 340 (7th Cir. 1985)
cert. denied
474 U.S. 1102 (1986) 21

City of Richmond v. J.A.Croson Co.,
488 U.S.469 (1989) 7, 10

Concrete Works of Colorado, Inc.
v.Denver,
36 F.3d 1513 (10th Cir. 1994)
cert. denied, ___ U.S. ___,
115 S.Ct. 1315 (1995) 20, 21

EEOC v. Korn Industries, Inc.,
662 F.2d 256 (4th Cir.1981) 18

Franks v. Bowman Transportation Co.,
424 U.S. 747 (1976) 18, 19

Hairston v. McLean Trucking Co.,
520 F.2d 226 (4th. Cir. 1975) ... 22

Holsey v. Armour & Co.,
743 F.2d 199 (4th Cir. 1984),
cert. denied
470 U.S. 1028 (1985) 22

Ingram v.
Madison Square Garden Ctr., Inc.,
482 F. Supp. 918
(S.D. N.Y.1979),
aff'd and modified
on other grounds,
709 F.2d 807 (2nd Cir. 1983) 19

James v.
Stockham Valves & Fittings Co.,
559 F.2d 310 (5th Cir. 1977),
cert. denied, 434 U.S. 1034 (1978) ... 18

King v. General Electric Co.,
960 F.2d 617 (7th Cir.1992) 18

Lanphear v. Prokop,
703 F.2d 1311 (D.C. Cir.1983) ... 17

Maryland Troopers Association, Inc.
v. Evans,
993 F.2d 1072 (4th Cir.1993) 10

McQuillen v. Wisconsin Education
Association Council,
830 F.2d 659 (7th Cir. 1987),
cert. denied
485 U.S. 1003 (1988) 21

Northeastern Florida Chapter
of the Associated General Contractors
of America v. City of Jacksonville,
508 U.S. 656 (1993) 20, 21

O'Halpin v.
Nassau County Police Department,
670 F. Supp. 75
(E.D. N.Y.1987) 19

Pinchback v. Armstead Homes Corp.,
907 F.2d 1447 (4th Cir.),
cert. denied
498 U.S. 983 (1990) 22

Presseisen v. Swarthmore College,
442 F. Supp. 593 (E.D. Pa.1977)
aff'd, 582 F.2d 1275
(3d Cir. 1978) 19

Regents of University of Cal.
v. Bakke,
438 U.S. 265 (1978) 20

Sperling v. Hoffman-La Roche, Inc.,
924 F. Supp. 1346
(D. N.J.1996) 19

Teamsters v. United States,
431 U.S. 324 (1977) 18, 19, 22

United States v. Gregory,
871 F.2d 1239 (4th Cir. 1989)
cert. denied
493 U.S. 1020 (1990) 18, 22

United States v.
Real Estate Development Corporation,
347 F. Supp. 776
(N.D. Miss.1972) 19

Vaszlavik v.
Storage Technology Corp.,
175 F.R.D. 672 (D. Colo.1997) ... 19

Whalen v. Rubin,
91 F.3d 1041 (7th Cir. 1996) 21

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 ..... 2, 13

42 U.S.C. § 1983 ..... 2, 11, 13

42 U.S.C. § 2000e-2 2

Petitioner, Ronald A. Brown, requests that the Supreme Court of the United States grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned proceeding on October 30, 1998.

REFERENCE TO OPINIONS BELOW

The opinions below are: Brown v. McLean, 159 F.3d 898 (4th Cir. 1989) (APP.1-27); oral opinion in open court, March 24, 1997 (App.30-31); Memorandum Opinion, February 25, 1997 (unreported)(APP.35-48).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit for which Petitioner seeks review was entered on October 30, 1998. (APP.1). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On November 13, 1998, Petitioner filed a Petition for Rehearing and Suggestion For Rehearing in Banc, which was denied by an order filed on December 8, 1998. (APP.65).

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, LOCAL ORDINANCES & REGULATIONS

The regulation called into question is the Baltimore City Affirmative Action Plan. (APP.67-106). Also pertinent are: Section 1 of the Fourteenth Amendment to the Constitution of the United States; 42 U.S.C., § 1981; 42 U.S.C., § 1983; 42 U.S.C., § 2000e-2(Title VII); Federal Rule of Evidence 403; and Article VII, §§ 118 and 121 of the Baltimore City Charter (1964 rev.) The text of these provisions are set forth in the Appendix. (APP.107-124).

STATEMENT OF THE CASE

> "... Brown has adduced significant evidence that he was the victim of a systematic racial purge carried out by [City Comptroller] Jacqueline McLean shortly after McLean was elected Comptroller of the City of Baltimore in November 1991. At the very least, Brown deserves a trial. ...Racial pogroms in the work force have no place in our country." Chief Judge Wilkinson's dissenting opinion. (APP.20, 26).

This is a case about the purge of white males from the upper management of the Comptroller's Office of Baltimore

City. The Comptroller of the City of Baltimore is an elected official who is a member of the City's Board of Estimates and heads the Department of the Comptroller. In December 1991, newly-elected Comptroller Jacqueline McLean, using information obtained from data maintained by the City to monitor compliance with its Affirmative Action Plan, determined that the number of white males in the Comptroller's Office was unacceptable and set out to rectify what she termed to be a lack of diversity, focusing on upper echelon management positions in the office. McLean wanted a "diversified" organization and:

> "basically zeroing in on the fact that if you have a team of people who--that is composed of all white males, that there needs to be some diversification. There needs to be minorities and also women within that organization. And they, too, need to have the opportunity to move up and not just hit a glass ceiling."

Soon after being sworn in, McLean stated openly in the office that she did not want pictures of white men on the walls of the Comptroller's Office. A short time later, the curator of City Hall removed all the pictures and portraits of Caucasians in the Comptroller's Office,

including a number of large historical oil portraits.

The highest non-charter Civil Service positions in each unit in the Department of the Comptroller were held by male Caucasians, except for one position which was held by an African-American female. In particular, the male Caucasians were Bertram Finkelstein, Deputy City Auditor, Erwin Burtnick, Assistant Comptroller, and Petitioner Ronald Brown, Administrator of Telephone Facilities. Each had Civil Service tenure and was a long-standing City employee. All three were exceptionally good employees and had good professional reputations.

In March 1992, McLean submitted her 1993 fiscal budget (effective July 1, 1992) to the Board of Estimates. The Board of Estimates is responsible for formulating and recommending the budget to the City Council. The Board's members, in addition to the Comptroller, are the Mayor, President of the City Council, City Solicitor, and Director of Public Works. McLean's budget did not fund the positions of Deputy City Auditor, Assistant Comptroller and Administrator of Telephone Facilities. Simultaneously, her budget created virtually identical or closely approximate positions (effective July 1, 1992), respectively, Audit Manager, Administrative Officer III and Director of Communication Services ("DCS").

McLean's budget included funding for the position of Director of the Municipal Post Office, which was headed by an African-American female. McLean advised the three incumbents by letter on May 26, 1992 that their positions had been abolished, albeit through no fault of their own.

Each of the three individuals had a right under the City Charter and Civil Service regulations to be placed on the re-employment list for the position that most closely approximated their abolished position. A person on the re-employment list for a particular position takes an absolute preference and priority over all other types of applicants for that position. (APP.124). McLean pre-selected and hired an African-American male, Rochelle Young, who had much less experience than Brown, for the DCS position on a provisional basis. He began work at Brown's desk on July 1, 1992. The Civil Service Commission acquiesced in this provisional appointment, although the position and circumstances were inappropriate for a provisional appointment under Civil Service regulations. On July 6, 1992, Brown, who has an MBA and twenty years of executive telephone management experience, was put on the re-employment list for a position as a working switchboard operator, a position which required only a high school equivalency and for which there was no vacancy.

On August 10, 1992, Civil Service advertised the DCS position. On August 17 or 18, 1992, Shirley Williams left her position as the City's Equal Opportunity Compliance Officer, where she was charged with oversight of the City's Affirmative Action Plan and Policy, and became the Deputy City Comptroller, where McLean put her in charge of personnel.[1] On October 21, 1992, Civil Service placed Young and four others on the eligibility list for the DCS position. McLean, as the appointing authority, made the decision about who would be hired for the DCS position, not Civil Service, and selected Young, who was already serving in the position on a provisional basis, from a list of eligible individuals provided to her by Civil Service.

McLean hired an African-American female for the Administrative Officer III position. She began work at Burtnick's desk on July 1, 1992. On July 6, 1992, Burtnick was put on the re-employment list for a mid-level auditor's position, for which there was no vacancy. McLean testified that Burtnick was considered but rejected for the position of Administrative Officer III, because he was Caucasian and a Caucasian could not represent her in that position as the City was 68% African-American:

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[1] Ms. Williams participated in the development of the Plan.

> "And the community being majority, the City is 68 percent black, that he had to represent me in a City that was predominantly black. ... I needed someone to represent me. I'm black. And I don't think Mr. Burtnick would be able, would even be able this day, to represent me in front of my community, just as I would not try to attempt to represent Mr. Burtnick in his community."

McLean simply told Finkelstein that he could not apply for the position of Audit Manager. Subsequently, McLean directed Alan Reynolds, the City Auditor, to appoint an African-American to the Audit Manager position, an individual whom he did not evaluate as highly as other candidates. When Reynolds refused, McLean publicly lambasted him at a press conference as a "white male".

Baltimore City has had an affirmative action plan since 1984 that gives preference to and sets quotas for African-Americans and females for placement in upper echelon employment positions. On March 7, 1989, Mayor Kurt Schmoke issued a "Policy Memorandum and Directive of the Mayor Concerning Equal Opportunity and Affirmative Action", in response to this Court's ruling in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). (APP. 67-106). Its purpose

was to advise all departments, agencies, bureaus, boards, commissions and City officials that the Baltimore City Equal Opportunity and Affirmative Action Plan was still in full force and effect and that it did not have an expiration date. (APP.67-69). The Policy Memorandum incorporated by reference and discussed the Affirmative Action Plan of 1984 (APP.69-73), which had as its purpose, among others, the full utilization of minority groups and women at all levels of the City's work force and set forth mandatory steps, including specific goals and timetable to achieve these goals. (APP.83-88, 93-96, 102-104).

The Policy Memorandum assigned primary responsibility for the implementation of the Plan to the City Solicitor who, in turn, was to delegate it to the "Equal Opportunity Compliance Office", which would function as part, and under the direct supervision, of the City Solicitor. (APP.88-93). The Baltimore City Plan, according to the deposition of Shirley Williams, the Deputy City Comptroller and former Equal Opportunity Compliance Officer in the City Solicitor's Office, was concerned with the fact that minorities were over-represented at lower salary levels, as opposed to being spread throughout the work force. The purpose of the Plan was, according to Ms. Williams, to obtain better utilization of minorities and women in administrative, professional,

legal, and managerial levels. Respondent City did not identify any history of intentional discrimination to warrant a race and gender-based remedy.

The City's Employee's Handbook, which was published by the City Civil Service Commission in 1990, states in pertinent part:

AFFIRMATIVE ACTION

> "The Agency Affirmative Action Plans set forth goals and objectives for the employment and promotion of minority groups, women and other protected classes, including reasonably precise timetables for their achievement. Each Agency has an employee who is designated as the Equal Opportunity Compliance (EOC) Officer."

The Baltimore City Plan provides that each City Agency is to have its own affirmative action plan and goals. Rudolf Koffler, from whom McLean obtained the affirmative action data in December, 1991, worked in the Bureau of Management Information Systems ("BMIS") in the Department of Finance. BMIS maintains computer data for the City. Koffler's duties included, among other things, arranging for the running on or about the first of July of each year a detailed

computer listing of various information, including race and sex, on all City employees for the Equal Opportunity Compliance Office in the City Solicitor's Office. It is labeled and known in the Equal Opportunity Compliance Office of the City's Department of Law as the "Affirmative Action Run". From December 3, 1991, when Ms. McLean took office, until McLean left office, no Caucasian males were hired in the entire Department of the Comptroller. As of the close of business, October 4, 1996, there were no Caucasians and only one male, Rochelle Young, left on the payroll of the executive office of the Comptroller.

The parties filed cross motions for summary judgment. Brown filed a motion for partial summary judgment; based on City of Richmond v. J.A.Croson Co., 488 U.S.469 (1989), and Maryland Troopers Association, Inc. v. Evans, 993 F.2d 1072 (4th Cir.1993); on the ground that the City and its Department of the Comptroller each had a race and gender-based employment policy, regulation, custom and usage in violation of the Equal Protection Clause and Title VII. Brown asserted that the City's affirmative action plan and policy set quotas and gave preference to African-Americans and women for upper managerial and professional positions without a basis for a race-based remedy and that McLean had acted consistent with this policy. Brown further asserted that the

City was responsible under 42 U.S.C. § 1983 for McLean's efforts to eliminate his position from the budget, because she acted pursuant to an official policy and practice, i.e., the affirmative action plan. The District Court, adopting Judge Smalkin's opinion in the companion case involving the Assistant Comptroller, see Burtnick v. McLean, 953 F.Supp. 121, 123, 126 (D.Md.1997) (APP. 53-54, 62),[2] concluded that there was no evidence that the actions complained of were taken pursuant to the City's affirmative action plan. (APP.39). The District Court also concluded, again adopting the reasoning of Judge Smalkin; see Burtnick, at 124 (APP.54-55); that the City was entitled to partial summary judgment on so much of Brown's claim as was based on the elimination of Brown's position as Administrator of Telephone Facilities, because there was no evidence that the Board of Estimates itself was racially motivated in eliminating Brown's position, although McLean may have been so motivated in recommending its elimination. (APP.39). In other respects, however, the District Court held that Brown had generated a material dispute of fact that he was not hired as the Director of Communication Services because of his race. The District Court rejected Defendant's argument that Brown

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[2] The Burtnick case has been stayed pending final appellate review in this case.

did not apply for the position, pointing out that a plaintiff need not apply for a position where it would be a futile gesture to do so. (APP.41-48). The Court was also of the view that because the DCS position was filled with a male, Brown could not be the object of discrimination based on sex. (APP.44). Thus, the case proceeded to trial only on Brown's failure to re-hire claims.

At trial, Brown was asked about whether he had reached any conclusions about his prospects for re-employment by August 1992, when the position of Director of Communications Services became open and he responded:

> "[b]y that time I did not feel that I had any opportunity... . Because I was convinced that frankly because I was white I was not appropriate for Ms. McLean's policy, what she wanted to do. ... [and]the events that had transpired, because of the statements that had been made by Mrs. McLean, because of actions I had witnessed... . I was convinced that I really did not have any opportunity, that I was not being properly considered for any job under the comptroller."

During the course of the trial, the Court excluded the City's affirmative

action plan from evidence. At the conclusion of the Plaintiff's case, the Court directed judgment on the remaining §§ 1981 & 1983 claims on the ground that there was no evidence that McLean dictated City policy or that there was a City policy that violated §§ 1981 or 1983. (APP.29-31). The Court directed judgment on the Title VII claim in favor of the Defendants on the ground that Brown had not placed himself on the re-employment list for the DCS position. (APP.29, 31-32).

The Fourth Circuit Court of Appeals affirmed. The majority, in a published opinion written by Circuit Judge Ervin, in which Circuit Judge Michael joined, reasoned that there was no evidence that McLean played a role in or influenced the Civil Service Commission's action in placing Brown on the re-employment list for the chief telephone operator and not the DCS position. (APP.10-13). Chief Judge Wilkinson, while concurring in all other parts of the majority opinion, wrote a vigorous, forceful dissenting opinion to the judgment (APP.20-27), stating among other things:

> "The rule of law should not turn on which race is burdened or benefited by this sort of conduct. Here, McLean's decision allegedly worked to the advantage of African-Americans. In other offices, under other

> managers, however, racial decisions will just as wrongly work to their detriment. According to McLean, '**I needed someone to represent me. I am black. I don't think [a white male manager] would even be able this day to be able to represent me in front of my community...**'. Apparently, McLean thought one-race policies were just good politics. Unfortunately, "good politics" has often been used in our sad past to sow racial division. "[A] free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." No such reason exists in this case." (APP.26). (Citation omitted).

In contrast to the majority opinion, Chief Judge Wilkinson reasoned that Brown, as a civil servant, had a right under the Baltimore City Charter to be placed automatically on the re-employment list for the job that most closely approximated his abolished position, where he would have priority over all other applicants. (APP.20- 24). The

Chief Judge was also of the opinion that the majority had overlooked and misapprehended Brown's contention, supported by "significant evidence", that McLean's discriminatory practices deterred him from applying for the DCS position. (APP.20, 23-26).

ARGUMENT

This case is of exceptional importance, since neither this Court nor any other federal court, except the Fourth Circuit in the instant case, has sanctioned "Racial pogroms in the work force..." and a policy that white males need not apply. The majority opinion, for those reasons stated in Chief Judge Wilkinson's dissent, has sanctioned "[r]acial pogroms" in public work places. The decision of the Fourth Circuit Court of Appeals in this case reflects a conflict among the Circuits on the matters in issue. The decision of the Court of Appeals in this case conflicts with the applicable decisions of this Court that individual acts of employment discrimination against minorities may be inferred from an employer's broad-based discriminatory policy. The decision of the Fourth Circuit also conflicts in this regard with its own decisions and those of the other circuits. The decision of the Court of Appeals conflicts with the decisions of this Court concerning "injury in fact" from discriminatory

policies in favor of minorities and women. The decision of the Court of Appeals in this case conflicts with the decisions of this Court and the other Circuits addressing the "futile gesture" doctrine where minorities have been the object of discriminatory employment practices and appears to create a double standard, one for minorities and women but another for Caucasian males.

All three judges on the Panel agreed that the District Court did not err in not considering or admitting into evidence the City's affirmative action plan and policy. (APP.14-16, 20). The Panel, therefore, did not assess the impact of the City's affirmative action plan on the futility of any application that Brown would have made for the new position or whether the affirmative action plan would have mandated the selection of an African-American, such as Young, and have precluded Brown's selection for the new position. The Panel did not address whether the affirmative action plan and policy was an official policy, regulation, custom and usage under which McLean operated in recommending the elimination of Brown's position and re-creation of positions in substantially similar forms.

The decision of the Fourth Circuit Court of Appeals affirming the District Court that Petitioner could not use the affirmative action plan as evidence of discrimination without direct evidence

that McLean or the City acted pursuant to the plan is in conflict with the decision of the District of Columbia Circuit in Bishopp v. District of Columbia, 788 F.2d 781 (D.C. Cir. 1986); see also Lanphear v. Prokop, 703 F.2d 1311 (D.C. Cir.1983). In Bishopp, the Court, including then Circuit Judge Scalia, reversed as clearly erroneous the finding of the District Court that the District of Columbia did not discriminate against five white male District of Columbia fire department employees who claimed they were discriminatorily denied promotion to a position that was filled by an African-American male. The Circuit Court held that a proposed affirmative action plan was evidence that the District wished to promote the African-American employee in part because of his race. See 788 F.2d, at 787; see also id., at 791 (Wald, concurring). Similarly, the Court, in Lanphear, which included then Circuit Judge Ginsberg, agreed with the District Court, although reversing a finding for the defendant on other grounds, that the plaintiff, a white male, had made out a prima facie case in part because, at the time of the selection, the Merit System Protection Board was under pressure from its head to increase the percentage of minority employees and was in the process of adopting an affirmative action plan.

The decisions of the District of Columbia Circuit are consistent with those cases holding that individual acts

of employment discrimination against minorities may be inferred and presumed from an employer's discriminatory policy, i.e., a pattern of discriminatory practices establishes reasonable grounds to infer individual employment decisions are made pursuant to a discriminatory policy. Teamsters v. United States, 431 U.S. 324, 362 (1977)(African-Americans and Spanish surnamed persons)("The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."); Franks v. Bowman Transportation Co., 424 U.S. 747, 773 & n.32 (1976); United States v. Gregory, 871 F.2d 1239, 1241n.6 (4th Cir. 1989) cert. denied 493 U.S. 1020 (1990) ("Once the pattern or practice has been proved, an inference is raised that all employment decisions, during the period in which the discriminatory practice has been in force, were made in pursuit of the policy."); EEOC v. Korn Industries, Inc., 662 F2d 256, 260-61 (4th Cir.1981); King v. General Electric Co., 960 F.2d 617, 623-24 (7th Cir.1992); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 356 (5th Cir. 1977), cert. denied 434 U.S. 1034 (1978)(Showing pattern of discriminatory practices established reasonable grounds to infer individual employment decisions made pursuant to

discriminatory policy);[3] see also Ingram v. Madison Square Garden Ctr., Inc., 482 F.Supp. 918, 922-23 (S.D. N.Y.1979) (Absent an application, each non-applicant from the discriminated class may prove an employment discrimination claim by presenting evidence that he or she desired a laborer's job, possessed the requisite qualifications, and would have sought a referral but for the Union's discriminatory practices.), aff'd and modified on other grounds, 709 F.2d 807 (2d Cir. 1983).

The decisions of the District of Columbia Circuit are consistent with this Court's pronouncements that individual acts of discrimination in favor of minorities and women may be inferred from

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[3] The reasoning utilized in the Teamsters and Franks decisions was applied in a District Court housing case that pre-dates them both, United States v. Real Estate Development Corporation, 347 F.Supp. 776, 783 (N.D. Miss.1972); see also Vaszlavik v. Storage Technology Corp., 175 F.R.D. 672, 679 (D. Colo.1997)(Court applies Teamsters presumption in action filed under ERISA, ADEA and ADA); Sperling v. Hoffman-La Roche, Inc., 924 F.Supp. 1346, 1359 (D. N.J.1996)(Court applies Teamsters presumption in action filed under the ADEA); O'Halpin v. Nassau County Police Dept., 670 F.Supp. 75, 78 (E.D. N.Y.1987) and Presseisen v. Swarthmore College, 442 F.Supp. 593, 601 (E.D. Pa.1977) aff'd 582 F.2d 1275 (3d Cir. 1978) (Courts apply Teamsters presumption in sex discrimination actions).

a discriminatory policy of a set-aside program. Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 665-66 (1993)(To establish standing, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.). The decisions of the District of Columbia Circuit are consistent with this Court's holdings that "injury in fact" is established in the context of standing for an equal protection claim:

> "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group. ... . And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract."

Id. (citations omitted); see also Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81(1978); see also Alexander v. Estepp, 95 F.3d 312, 318 (4th Cir. 1996)(applying Croson), cert. denied, __ U.S. ___, 117 S.Ct. 1425 (1997); Concrete

Works of Colorado, Inc. v. Denver, 36 F.3d 1513, 1518 (10th Cir. 1994)(applying Northeastern Florida Chapter), cert. denied, ____ U.S. ____, 115 S.Ct. 1315 (1995).

By contrast to the decisions of the District of Columbia Circuit are the Sixth, Seventh and Ninth Circuits, which are in line with the decision of the Court of Appeals in this case. Canham v. Oberlin College, 666 F.2d 1057, 1061 (6th Cir. 1981), cert. denied 456 U.S. 977 (1982); McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659, 666 (7th Cir. 1987), cert. denied 485 U.S. 1003 (1988) (stating there was no need for court to address validity of affirmative action plan where plaintiff failed to establish causal connection between the plan and his hiring claim); Cerrato v. San Francisco Community College Dist., 26 F.3d 968, 976 (9th Cir. 1994)(stating that common sense dictates "that the mere fact of an affirmative action plan's existence is not relevant to proving discrimination unless the employer acted pursuant to the plan"); see also Whalen v. Rubin, 91 F.3d 1041 (7th Cir. 1996); Christensen v. Equitable Life Assurance Society of the United States, 767 F.2d 340 (7th Cir. 1985) cert. denied 474 U.S. 1102 (1986).

Throughout the long ordeal of Ronald Brown that serves as the basis of this action, every turn in the road has been marked by a giant sign proclaiming

"pretext". The decision of the Court of Appeals, however, gives its blessing to an elected official's racial agenda and places the opinion of the majority in conflict with the well-established precedent in this Court and the Courts of Appeal applying the "futile gesture" doctrine to minorities. See Teamsters, 431 U.S. at 365-366 ("A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection."); Pinchback v. Armstead Homes Corp., 907 F.2d 1447 (4th Cir.), cert. denied 498 U.S. 983 (1990)(Afican-American); United States v. Gregory, 871 F.2d 1239 (4th Cir. 1989), cert. denied 493 U.S. 1020 (1990) (females); Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984), cert. denied 470 U.S. 1028 (1985)(African-American persons); Hairston v. McLean Trucking Co., 520 F.2d 226 (4th. Cir. 1975)(African-American employees).

CONCLUSION

"Racial pogroms in the work force have no place in our country." The public workplace is most certainly not the place for racial agendas and pervasive municipal policies mandating racial preferences. The Petition should be granted to resolve conflicts between the decision in this case of the Court of

Appeals and decisions from this Court, as well as the Courts of Appeals of the other Circuits. A decision by this Court will resolve the uncertainty that now exists by virtue of conflicting rulings on important questions of federal law and public importance.

Respectfully Submitted,

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TABLE OF CONTENTS
Appendix to the Petition

Opinion,
United States Court of Appeals
for the Fourth Circuit
entered October 30, 1998 .... App.1

Order,
United States District Court
for the District of Maryland
entered March 25, 1997 ..... App.28

Memorandum Opinion,
United States District Court
for the District of Maryland
entered March 24, 1997 ..... App.30

Order,
United States District Court
for the District Court of Maryland
entered February 26, 1997 .. App.33

Memorandum Opinion,
United States District Court
for the District of Maryland
entered February 26, 1997 ... App.35

Opinion,
United States District Court
for the District of Maryland
entered January 29, 1997 .... App.49

Order Denying Petition for Rehearing,
United States Court of Appeals
for the Fourth Circuit
entered December 8, 1998 .... App.65

EXHIBITS:

Plaintiff's 12D,
"Policy Memorandum & Directive of
Baltimore City concerning Equal Employ-
ment Opportunity and Affirmative Action"
Identified 03/24/97, tr. 577), filed
March 7, 1989 and Plaintiff's A (Summary
Judgment)
filed September 3, 1996 67

CONSTITUTION:

Section 1:
Fourteenth Amendment 107

CODES:

42 U.S.C. §1983 108

42 U.S.C.,§1981.
(Equal rights under the law) 109

42 U.S.C. §2000e-2 (Title VII) 110

RULES OF FEDERAL EVIDENCE:

Rule 403 121

ARTICLES:

Article VII, § 118
Of the Baltimore City Charter
(1964 Rev.) 122

Article VII, §121
Of the Baltimore City Charter
(1964 Rev.) 125

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RONALD A. BROWN,
Plaintiff - Appellant,

v.

JACQUELINE F. MCLEAN;
MAYOR AND CITY COUNCIL
OF BALTIMORE,
Defendants - Appellees.

Appeal from the United States
District Court for the
District of Maryland, at Baltimore.
William M. Nickerson, District Judge.

(CA-95-387-WMN)
No. 97-1509

Argued: December 4, 1997
Decided: October 30, 1998
Entered: October 30, 1998

Before WILKINS, Chief Judge, and ERVIN and MICHAEL, Circuit Judges.

Affirmed by published opinion, Judge Ervin wrote the opinion, in which Judge Michael joined. Chief Judge Wilkinson wrote a concurring and dissenting opinion.

COUNSEL

ARGUED: Howard J. Schulman, SCHULMAN & KAUFMAN, L.L.C., Baltimore, Maryland, for

Appellant. Kathryn E. Kovacs, Assistant, Solicitor, BALTIMORE CITY LAW DEPARTMENT, Baltimore, Maryland, for appellees. **ON BRIEF**: Joseph S. Kaufman, SCHULMAN & KAUFMAN, L.L.C., Baltimore, Maryland, for Appellant. Otho M. Thompson, City Solicitor, Joanne Evans-Anderson, Principal Counsel, BALTIMORE CITY LAW DEPARTMENT, Baltimore, Maryland, for Appellees.

DISPOSITION: AFFIRMED.

OPINION

ERVIN, Circuit Judge:

Plaintiff-appellant Ronald A. Brown brought this action against defendants Jacqueline F. McLean, his former supervisor, and the Mayor and City Council of Baltimore (the "city"), alleging that he was improperly terminated in a "purge" of white males from the upper management levels of the city Comptroller's office, and that his termination and the defendants' subsequent failure to rehire him in a different position violated Title VII of the Civil Rights 1998 U.S. App. 225 Act of 1964 and his equal protection rights under 42 U.S.C. §§ 1981 and 1983. Brown appeals the district court's orders granting summary judgment and judgment as a matter of law in favor of the defendants, and the district court's decision to exclude certain evidence.

For the reasons stated hereafter, we affirm.

I.

At the time of his termination on July 1, 1992, Brown was employed by the City of Baltimore as Administrator of Telephone Facilities. In this position, Brown directed and coordinated the operations of all the city government's telephone services, including paging systems, cellular telephones, faxes, and computer networks. McLean was the elected Comptroller of Baltimore City at all times pertinent to this action, and Brown's supervisor. Brown is a white male; McLean is a black female.

McLean took office as the city's Comptroller on December 3, 1991. Apparently from the start of her tenure, McLean was quite vocal about what she perceived as a lack of diversity in her office. One of McLean's first acts as Comptroller was to complain that the portraits in the office were exclusively of white males and to have the portraits removed. McLean appointed a transition team to assist her in assuming office, and on December 18, 1991, this team issued a report recommending, inter alia, that the municipal post office and telephone departments be combined into a "Communications Services Department" under one manager. According to this report, the restructuring would "use present personnel on board" and "take maximum advantage of proven personnel

capabilities . . . ." J.A. at 935. McLean adopted this recommendation, the city's Budget Office concurred with her, and the recommendation was forwarded to the city's Board of Estimates.

On May 13, the Board of Estimates, of which McLean was a voting member, made its budget recommendations to the City Council. These recommendations eliminated the position of Administrator of Telephone Facilities and added the position of Director of Communications Services ("DCS"), which encompassed both the duties held by Brown and oversight of the city's post office.

On May 26, Brown learned in a letter from McLean that his position was being abolished. The letter stated that it was through no fault of his own and that the change had been made pursuant to her transition team's recommendations. J.A. at 902. Brown's last day on the job was June 29, 1992. Prior to his departure, on June 26, Brown met with McLean for an exit interview. During their meeting, McLean asked him whether he would apply for the DCS position. Brown testified that he told her he thought he would. J.A. at 606. On July 1, 1992, Rochelle Young, a black man, was provisionally appointed to the Director of Communications Services position and began working in Brown's old office.

Baltimore City regulations required that any person holding a position that was abolished be placed on a re-employment list "for such position as,

in the judgment of the Civil Service Commission, shall most nearly approximate the position abolished." Charter of Baltimore City, Art. VII, § 121, in J.A. at 1060. A person on the re-employment list for a particular position takes absolute priority over all other applicants for that position. Pursuant to this regulation, the Civil Service Commission placed Brown on the re-employment list for the position of Telephone Supervisor, for which there was no vacancy. The Telephone Supervisor is a working telephone operator sitting at a telephone switchboard console, who supervises other switchboard operators. Job requirements for the Telephone Supervisor position are a high school diploma or its equivalency and five years switchboard experience. Brown has an M.B.A. and no experience as a switchboard operator.

There is conflicting evidence about why Brown was not placed on the preferred re-employment list for the DCS position. There was some suggestion that Brown was not placed on the list because the position included responsibilities that were not part of the Administrator of Telephone Facilities position that he had held prior to his termination. Elsewhere, and in oral argument, the city maintained that there was no re-employment list for the DCS position because it was a newly created position. Although provisions exist to allow laid-off employees to question the Civil Service Commission's determination, J.A.

at 1033, Brown never contacted the Civil Service Commission to discuss his obviously improper placement on the re-employment list or the possibility of placing him on the re-employment list for a position more closely approximating his abolished job.

The DCS position was advertised in the newspaper and posted at the Civil Service Department for open competition. Because Mr. Young's appointment was originally provisional, he was required to compete with other applicants for the permanent position. After the competitors for the position were interviewed, Young was hired for the DCS position on a permanent basis. Brown never applied for the job through the open competition process.

On February 7, 1995, Brown filed suit against the Mayor and City Council of Baltimore and against McLean in her official capacity. Brown sought damages under 42 U.S.C. §§ 1981 and 1983 for violation of his Fourteenth Amendment right to equal protection, and under Title VII of the Civil Rights Act of 1964. The defendants filed a motion for summary judgment, which the district court granted in part and denied in part, and Brown filed a motion for partial summary judgment, which the district court denied. In response to the defendants' motion, the district court, adopting the reasoning of the recent decision in a related case, Burtnick v. McLean, 953 F. Supp. 121 (D. Md. 1997), held that the city was

entitled to summary judgment on the claim of unlawful discrimination in the elimination of Brown's position and, because the DCS position had been filled by a male, on Brown's claim of discrimination based on sex. The district court, however, refused to grant summary judgment on Brown's failure-to-rehire claim, stating that Brown had established a genuine question of material fact that he was not hired for the DCS position because of his race.

Brown's motion for partial summary judgment asked the district court to hold that the city's affirmative action plan constituted a race- and gender-based employment policy in violation of Title VII and the Fourteenth Amendment. The court denied this motion, again adopting the reasoning in Burtnick, 953 F. Supp. 121, and finding that there was no evidence that the actions of which Brown complained were taken pursuant to the city's affirmative action policy.

The case then went to trial on Brown's Title VII failure-to-rehire claim and his §§ 1981 and 1983 claims against the city. On the trial's first day, the district court dismissed McLean as a defendant, citing our opinion in Burtnick v. McLean, 76 F.3d 611 (4th Cir. 1996), that held that individual members of the Board of Estimates are entitled to legislative immunity under § 1983. During the trial, the court, ruling on a motion in limine filed by the city, excluded the city's affir-

mative action plan from evidence. At the conclusion of Brown's case, the city moved for judgment as a matter of law. The district court granted this motion, finding that Brown had not produced legally sufficient evidence that there was a city-wide policy that violated §§ 1981 and 1983, and that Brown had failed to establish a prima facie case of racial discrimination because he had not applied for the DCS position nor had he shown that such an application would have been futile. Brown now appeals numerous of the district court's above-mentioned rulings, on the grounds discussed below.

II.

Brown's first assignment of error is that the district court erred in granting judgment for the city on his Title VII claim at the close of his evidence. Judgment as a matter of law is appropriate when "a party has been fully heard . . . and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party." Fed. R. Civ. P. 50(a)(1). On appeal, we evaluate the sufficiency of the evidence de novo, while viewing the facts and drawing all reasonable inferences in favor of the nonmoving party. Towler v. Sayles, 76 F.3d 579, 581 (4th Cir. 1996). The district court granted judgment as a matter of law for the city on the ground that Brown had not shown either that he had applied for the DCS

position or that such an application would have been futile, and that he therefore failed to establish a prima facie case of discrimination. We agree and affirm the district court.

In any Title VII action, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). More specifically, in order to prove a prima facie case of discriminatory failure to hire or promote under Title VII, a plaintiff must prove that: (1) he is a member of a protected group; (2) he applied for the position in question; (3) he was qualified for the position; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. See id.; Alvarado v. Board of Trustees of Montgomery Community College, 928 F.2d 118, 121 (4th Cir. 1991). Assuming he meets the other three prongs of the McDonnell Douglas test, a plaintiff who has failed to apply for a job may still carry his burden of proof if he can demonstrate that "he would have applied but for accurate knowledge of an employer's discrimination and that he would have been discriminatorily rejected had he actually applied." Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1451 (4th Cir. 1990). In such a case, a plaintiff is not required to subject himself "to the humiliation of explicit and certain rejection" and his

unwillingness to engage in the futile gesture of formally applying for the position in question is excused. United States v. Gregory, 871 F.2d 1239, 1242 (4th Cir. 1989); see also International Bhd. of Teamsters v. United States, 431 U.S. 324, 368, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977) (originating "futile gesture" doctrine).

There is no question that Brown failed to apply for the DCS position through the open competition process. Brown argues that this is not dispositive of the question, however, because he assumed he would automatically be considered for the DCS position because of the city's policy of placing laid-off workers on re-employment lists for equivalent positions. Brown apparently felt that it was therefore unnecessary for him to actively apply for the position.

Brown was not placed on the re-employment list for the DCS position, however. Two reasons have been advanced by the city for why Brown was never put on such a list: first, that because the DCS position was new, it had no corresponding re-employment list on which Brown could have been placed; and second, that such a placement was not appropriate because the DCS position encompassed responsibilities that had not been part of Brown's former job and in which he had no prior experience. We find it unnecessary to decide which of these explanations is correct. While it is true that the Civil Service

Commission's placement of Brown on the re-employment list for the low-level position of Telephone Supervisor was inappropriate, there is no evidence that McLean played a role in or influenced the Civil Service Commission's action. In addition, Brown was aware, or should have been aware, of the inappropriate placement but did nothing to correct it. Shortly after his termination, Brown received a letter from the Civil Service Commission indicating that he had been put on the re-employment list for the Telephone Supervisor position. Brown testified that he did not know the exact nature of the Telephone Supervisor position, and that he continued to assume even after he had received the re-employment list letter that he would be considered for the DCS position.

While Brown perhaps could not have imagined that the Civil Service Commission would see fit to place him on a re-employment list for a position several rungs lower than the one from which he had been terminated, we cannot find that Brown applied for the DCS position based on his mistaken assumption that he would automatically be considered for it. Even if there was a "re-employment list" for the DCS position, the position encompassed duties that had not been part of the Administrator of Telephone Facilities position that Brown had held. The Civil Service Commission therefore could have reasonably concluded that the DCS position was at a higher level and

thus did not "reasonably approximate" Brown's abolished position.

Furthermore, even if Brown was not aware of the exact nature of the Telephone Supervisor position, it was clear when he received the letter stating that he was on the re-employment list for that job that it was not the DCS position, which was responsible for running the Municipal Post Office as well as the city telephones. In spite of this notice, Brown failed to question the Civil Service Commission about his re-employment list placement, or to check whether he was on a list for the DCS position. Because Brown failed to actively apply for the position through the open competition process or to request that the Civil Service put him on the list for consideration for the higher-level position, we cannot find that Brown applied for the position in question.

We must next determine whether Brown's failure to apply for the DCS position is excusable. While Title VII does not require a plaintiff to apply for a job when to do so would be a futile gesture, a plaintiff claiming he was deterred from applying for a job by his employer's discriminatory practices has the burden of proving that he would have applied for the job had it not been for those practices. Teamsters, 431 U.S. at 368. Brown has not met this burden. Brown does not contend that McLean's alleged discriminatory practices prevented him from applying for the

DCS position. Rather, he failed to apply for the position on the false assumption that he would automatically be considered for it and that there was therefore no need for him to actively compete for the position. In addition, Brown's own testimony indicates that at his exit interview with McLean, she inquired whether he would be applying for the DCS position. Brown does not suggest, nor is there any evidence to indicate, that this inquiry was in any way intended to discourage him from applying for the position or to suggest to him that any such application on his part would be met with certain rejection. Cf. United States v. Gregory, 871 F.2d 1239, 1241-42 (4th Cir. 1989) (excusing female plaintiff's failure to formally apply for deputy position because employer had explicitly stated he did not hire women deputies); Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984) (applying "futile gesture" doctrine when employer had no black employees in sales and had actively discouraged blacks from applying for sales jobs).

In sum, we find that Brown did not carry his burden of establishing a prima facie case of discrimination because he failed to apply for the position or to show that his failure to apply was based on his knowledge that to do so would have been futile. Accordingly, we affirm the district court's grant of judgment as a matter of law for the city on Brown's Title VII claim.

III.

Brown next contends that the district court erred in denying his motion for partial summary judgment on his claim that the city's affirmative action plan constituted a race- and gender-based employment policy, practice, and custom, and in excluding evidence of the affirmative action plan at trial. Finding no error, we affirm the district court's summary judgment and evidentiary decisions.

A. Summary judgment is only appropriate when, viewing the evidence in the light most favorable to the nonmovant, there remains no genuine issue as to any material fact. See Fed. R. Civ. P. 56(c); Henson v. Liggett Group Inc., 61 F.3d 270, 274 (4th Cir. 1995). We review the district court's grant or denial of summary judgment de novo, see Resorts of Pinehurst, Inc. v. Pinehurst Nat'l Corp., 148 F.3d 417, 420 (4th Cir. 1998).

Whether or not the city's affirmative action plan constituted an Unconstitutional race- and gender-based employment policy, practice and custom is only an issue if McLean's actions were taken pursuant to the plan. See, e.g., Cerrato v. San Francisco Community College Dist., 26 F.3d 968, 976 (9th Cir. 1994) (stating that common sense dictates "that the mere fact of an affirmative action plan's existence is not relevant to proving discrimination

unless the employer acted pursuant to the plan"); McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659, 666 (7th Cir. 1987) (stating there was no need for court to address validity of affirmative action plan where plaintiff failed to establish causal connection between the plan and his hiring claim). There is here, however, no direct evidence that there was any nexus between McLean's actions and the existence of the city's affirmative action plan. Brown concedes as much, but suggests that one could reasonably infer a nexus because such a plan existed and McLean hired minorities. See Appellant's Brief at 35-37. This we cannot do at the summary judgment stage, where we must "draw all justifiable inferences in favor of the nonmoving party." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991). For the purposes of Brown's motion for partial summary judgment, then, we must draw all inferences in favor of the city, as the nonmoving party. Accordingly, we must infer that McLean did not act pursuant to the city's affirmative action plan. It is therefore unnecessary for us to determine the validity of the city's affirmative action plan as a matter of law, and we affirm the district court's denial of Brown's motion for partial summary judgment on this issue.

B. Brown also argues that the district court should have admitted the city's affirmative action plan into

evidence at trial. We review the court's decision to exclude evidence for abuse of discretion. See Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1357 (4th Cir. 1995).

The city filed a motion in limine with the district court seeking to prohibit Brown from introducing evidence of the city's affirmative action plan. The city argued that this evidence had no probative value because the district court had not found the plan to be implicated in Brown's personnel action, and also maintained that introducing the plan would be prejudicial. J.A. at 91. The district court, without discussing upon which ground it was basing its decision, granted the city's motion.

As noted above, Brown argues that one could infer a nexus between McLean's actions and the city's affirmative action plan. We therefore hesitate to say that there was no probative value to introducing the city's affirmative action plan into evidence. Nonetheless, we cannot say that the district court abused its discretion in its apparent finding that the prejudicial value of admitting evidence of the affirmative action plan substantially outweighed its probative value, see Fed. R. Evid. 403, and we affirm the district court's decision to exclude it at trial.

IV.

Brown maintains that the district court improperly dismissed McLean as a

defendant in this case. In dismissing McLean, the district court relied on the reasoning in Burtnick v. McLean, 76 F.3d 611 (4th Cir. 1996), in which a panel of this court found McLean was entitled to legislative immunity in a related case raising the same issues that were on trial here. Brown contends that our Burtnick decision was in error and invites us to reconsider it here. We must decline to do so. Not only are we unable to overturn another panel's decision, United States v. Guglielmi, 819 F.2d 451, 457 (4th Cir. 1987) (only an en banc court, not a subsequent panel, has authority to overturn a previous panel's published decision), but the record reflects that Brown failed to properly preserve this issue for appeal because he failed to make a timely objection to McLean's dismissal. Therefore, we also decline to consider this issue because it was raised for the first time on appeal. See Karpel v. Inova Health Sys. Servs., 134 F.3d 1222, 1227 (4th Cir. 1998) (issues raised for the first time on appeal generally will not be considered, unless refusal to consider the issue would be plain error or would result in a fundamental miscarriage of justice); Muth v. United States, 1 F.3d 246, 250 (4th Cir. 1993) (same).

V.

Brown also assigns other errors to the district court, none of which we

find have any merit. He contends the district court's decision to exclude a number of exhibits was prejudicial error. Based on our review of the record, however, we cannot say that the district court abused its discretion in excluding this evidence.

Brown also argues that the district court erred in granting summary judgment against him on his sex discrimination claim. The district court dismissed this claim because Brown was replaced by a male. We affirm on the same ground. In order to make out a prima facie case of discriminatory termination, a plaintiff must ordinarily show that the position ultimately was filled by someone not a member of the protected class. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993); Klein v. Derwinski, 869 F. Supp. 4, 7 (D.D.C. 1994). Although some courts have indicated that there may be exceptions to this rule in limited situations, such as in age discrimination cases where a plaintiff within the protected class is replaced by another, but significantly younger, person within the same class, see, e.g., O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 134 L. Ed. 2d 433, 116 S. Ct. 1307 (1996) (holding in age discrimination claim that fact that plaintiff in protected class has been replaced by another person in protected class is irrelevant, so long as he has been replaced because of his age), where there has been a significant lapse of

time between the plaintiff's application and its eventual decision to hire another individual within the same protected class, see, e.g., Howard v. Roadway Express, Inc., 726 F.2d 1529, 1535 (11th Cir. 1984) (finding lapse of eleven months would significantly diminish reliability of subsequent hiring as indicator of employer's intent at time it rejected plaintiff's application and thus could not rule out inference of discrimination in connection with earlier denial of plaintiff's application), or where the employer's hiring of another person within the protected class is calculated to disguise its act of discrimination toward the plaintiff, see, e.g., Jones v. Western Geophysical Co., 669 F.2d 280, 284-85 (5th Cir. 1982). None of these exceptions are applicable here. Even if Brown had applied for the DCS position, the city hired another male for the position at the same time that Brown would have been considered for the position. Neither has Brown presented any evidence that the city's hiring of a male for the DCS position was designed to hide discrimination against Brown on the basis of his gender. Consequently, Brown has failed to establish a prima facie case of sexual discrimination, and we affirm the district court's grant of summary judgment on that claim.

VI.

For the reasons given above, we affirm the district court in all respects.

AFFIRMED

CONCUR BY: WILKINSON (In Part)
DISSENT BY: WILKINSON (In Part)
DISSENT: WILKINSON, Chief Judge, concurring in part and dissenting in part:

I would reverse the district court's grant of judgment as a matter of law on Ronald Brown's Title VII race discrimination claim.[1] Brown has adduced significant evidence that he was the victim of a systematic racial purge carried out by Jacqueline McLean shortly after McLean was elected Comptroller of the City of Baltimore in November 1991. At the very least, Brown deserves a trial.

On November 26, 1991, McLean, an African-American female, called Rudolph Koffler in the Bureau of Management Information Services and asked him for data on the name, address, race, and sex of each employee in the Department of the Comptroller. Based on this data, and on a visual inspection of the Department, McLean concluded that the

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[1] In all other respects, I would affirm the district court.

office's "predominantly white male" status was unacceptable. She then pronounced that she did not want any pictures of white men on the walls of the Comptroller's office and ordered them removed. She later expressed doubts about the ability of a white male manager to serve and represent her or the people of the City of Baltimore.

The purported "reorganization" of the Comptroller's office was little more than a racial reshuffle. When McLean took office white men, including Brown, held three of the four highest civil service positions in the Department -- Deputy City Auditor, Assistant Comptroller, and Administrator of Telephone Facilities. In 1992 McLean submitted a budget to the Board of Estimates that provided no funding for the three positions held by the white men. The budget created the seemingly parallel positions of Audit Manager, Administrative Officer III, and Director of Communication Services (DCS). On May 26, 1992, McLean informed Brown and the two other white male managers that their positions had been abolished pursuant to the "reorganization." The one position held by an African-American female, that of the Director of the Municipal Post Office, was left unchanged and fully funded. McLean insisted that she simply was following her transition team's suggestions. The transition team's report, however, recommended retaining Brown.

There is no evidence that Brown performed unsatisfactorily. On the contrary, the evidence shows that other governmental units around the state of Maryland adopted Brown's innovations. McLean herself complimented Brown on several of his cost-saving suggestions, telling him to implement them immediately. And she further informed him that she was satisfied with his work. A short time later, she recommended eliminating his position.

As a civil servant, Brown had a right to be placed automatically on the re-employment list for the job that most closely approximated his abolished position. Charter of Baltimore City art. VII, § 121. An employee on that list would have priority over all other applicants. However, Brown was not listed for the DCS job. Instead the Civil Service Commission placed Brown, who has an M.B.A. and twenty years of management experience, on the re-employment list for the position of Telephone Supervisor -- in effect the position of a switchboard operator. Not only did the position require nothing more than a high school equivalency certificate, it had no vacancy.

McLean interviewed Rochelle Young, an African-American male, to fill the DCS position. Young possessed no municipal experience and no experience dealing with telephone company customers. What telephone experience he had was limited largely to equipment

upkeep and development. McLean hired him anyway.

Brown's story was not aberrational. The City similarly failed to rehire the other employees whose jobs it abolished. The former Assistant Comptroller was considered but not hired for the parallel position of Administrative Officer III. The City ultimately listed him for an unavailable mid-level auditor position. McLean eventually filled the Administrative Officer III job with an African-American female. She justified her choice by insisting that no Caucasian could serve as her assistant. In addition, the former Deputy City Auditor was flatly told he could not apply for the parallel job of Audit Manager. Finally, McLean directed Allan Reynolds, the City Auditor, to fill one of the newly created Audit Manager positions with George Carter, an African-American, in the face of Reynolds' protests that Carter was less qualified than other non-minority candidates. McLean informed Reynolds that "her policy was to appoint black minority candidates to the maximum extent possible." According to Brown, by the time McLean left office, no Caucasians and only one male, Young, were left on the payroll of the executive office of the Comptroller.

In affirming the district court, the majority relies on Brown's failure to apply formally for the DCS position. Brown's failure to apply, however, poses no bar to his Title VII claim. First, no

mechanism exists by which Brown could place himself on a re-employment list. See Baltimore Civil Service Rule 41(b) (leaving the decision to the Commission). Indeed, as noted, the City's charter automatically provided him with a right to be considered for the DCS job, rather than for a job as a switchboard operator. Consequently, a jury could well have found that Brown did all he had to do to apply for the DCS position.

Second, Brown presented sufficient evidence for a reasonable jury to find that applying was futile. He proffered a claim that he "would have applied [for the DCS job] but for accurate knowledge of [the City's] discrimination and that he would have been discriminatorily rejected had he actually applied." Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1451 (4th Cir. 1990). Brown learned shortly before he received his re-employment list assignment that McLean had provisionally hired an African-American for the DCS job. That person moved into Brown's old office and assumed Brown's old duties. Similarly, Brown witnessed the elimination of civil service positions held by whites and "was convinced that . . . because [he] was white" McLean would not hire him. In fact, McLean refused to re-hire one of the other white managers for the new Administrative Officer III position simply because he was white. Moreover, she told the third displaced manager not even to apply for the position most

closely approximating his old job. Given such a pattern, Brown need not have subjected himself "to the humiliation of explicit and certain rejection." United States v. Gregory, 871 F.2d 1239, 1242 (4th Cir. 1989).

The City asserts that McLean's behavior and the Commission's failure to list Brown properly were unconnected. Consequently, it maintains, McLean's motivation is irrelevant to the Commission's incorrect listing of Brown. A court ought not indulge this bureaucratic shell game. If the Commission had listed Brown properly, he would have assumed the DCS position -- a result that would have placed him back in close proximity to McLean. That the Commission would be unaware of McLean's agenda, especially in the face of her racially-charged public pronouncements, is highly unlikely. When a prominent elected official dismisses an employee under circumstances such as these, it is far-fetched to assume that the Commission would defy her wishes by simply rehiring him.

In effect, the City is asking this court to review Brown's claim while covering one eye and squinting with the other. In ceding to McLean's wishes, the Commission failed even to follow its own procedures. For instance, the Commission did not perform a field audit on McLean's suggested reorganization. A field audit would have involved interviewing Brown; the Commission failed even to contact him. Similarly, the

Commission followed orders to keep the reorganization a secret from Reynolds despite the fact that city protocol required that he be notified.

The rule of law should not turn on which race is burdened or benefitted by this sort of conduct. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). Here, McLean's decision allegedly worked to the advantage of African-Americans. In other offices, under other managers, however, racial decisions will just as wrongly work to their detriment. According to McLean, "I needed someone to represent me. I am black. I don't think [a white male manager] would even be able this day to be able to represent me in front of my community . . . ." Apparently, McLean thought one-race policies were just good politics. Unfortunately, "good politics" has often been used in our sad past to sow racial division. "[A] free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." Id. (internal quotation marks omitted). No such reason exists in this case.

Racial pogroms in the workforce have no place in our country. Brown should be allowed to say that he had performed capably as Administrator of Telephone Facilities for many years, that he was the most qualified person

for the DCS position, and that he was not rehired for that position for no reason other than his race. And a jury should be allowed to conclude that such treatment of him violates the core mandate of Title VII.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD A. BROWN, *

Plaintiff *

v. *

JACQUELINE F. McLEAN, et al. *

Defendants *

* * * * * * *

Case No. WMN 95-387
Entered: March 25, 1997

O R D E R

For the reasons stated in the Court's bench decision, it is, this 24th day of March 1997, by the Court, ORDERED AND ADJUDGED:

1. That the Defendant, at the close of the Plaintiff's case-in-chief, made a proper motion for judgment stating that the Plaintiff had failed to produce legally sufficient evidence to support his claims under 42 U.S.C. § 1983, 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, et seq. (Title VII).

2. That the Plaintiff offered argument in opposition to the Defendant's motion for judgment.

3. That the Court viewed the motion for judgment in a light most favorable to the Plaintiff.

4. That upon review of all the evidence presented by the Plaintiff, the Court determined that the Plaintiff failed to present legally sufficient evidence to support submitting to the jury all of the Plaintiff's claims under the statutes cited above.

THEREFORE, the Court hereby grants the Defendant's motion for judgment as to all of the Plaintiff's claims under 42 U.S.C. § 1983, 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, et seq. (Title VII) and for those reasons dismiss the Plaintiff's complaint in its entirety.

/s/
WILLIAM M. NICKERSON
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD BROWN,

Plaintiff,

vs.

MAYOR AND CITY COUNCIL
OF BALTIMORE,

Defendant.

Baltimore, Maryland
Civil Action No. WMN-95-387
March 24, 1997

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS
(TR. 609-610)
Entered July 2, 1997

BEFORE:

THE HONORABLE WILLIAM M. NICKERSON

OPINION

THE COURT: Counsel, I have looked at some of the authority that has been cited and I have reviewed those portions of the evidence that I think are important to review with respect to the motion that is before the Court.

First of all, with respect to the 1981 and 1983 claims, it's clear to the Court that the plaintiff has not

produced legally sufficient evidence that Ms. McLean was in any position to dictate city policy or that there was city policy which violated the provisions of either Section 1981 or 1983 and, accordingly, defendant's motion as to 1981 and 1983 claims is granted.

The Title VII claim was a little more troublesome. Not most of the evidence but there was a lot more evidence to consider with respect to the Title VII claim in terms of whether there is or is not legally sufficient evidence to allow the trier of fact to make a determination.

The principal basis for the Court's ruling on that claim has to do with the factor that plaintiff would have to show with respect to a futile gesture in terms of not making application or putting himself on the rehire list.

The fact of the matter is that plaintiff by his own testimony did not place himself on that list because he believed that in fact it was not necessary. It was the testimony that he gave. He believed that he would be put on that list automatically.

There was no direct statement made to the plaintiff at any point in time that I could determine from my notes that he would not be eligible to be on that rehire list by reason of race.

The bottom line is, without that factor being present, legally sufficient evidence of it being present, I find no way that this case can go to tne jury on

legally sufficient evidence. Accordingly, I feel constrained to grant and will grant the defendant's motion for judgment. If you want to present an order to that effect, I will be glad to sign it, Mr. Ruckle.

MR RUCKLE: Your Honor, I will put together an order and have it over to the Court by this afternoon.

THE COURT: All right. Thank you, counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD A. BROWN	*
	*
v.	*
	*
JACQUELINE F. McLEAN, et al.	*

Civil Action No.WMN-95-387
Entered: February 26, 1997

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 25th day of February 1997, by the United States District Court for the District of Maryland, hereby ORDERED

1. That Plaintiff's Motion for Partial Summary Judgment (Paper No. 17) is DENIED;

2. That Defendants' Motion for Summary Judgment (Paper No. 18) is GRANTED IN PART AND DENIED IN PART, in that:

a. The motion is GRANTED, in favor of Defendants Mayor and City Council of Baltimore and against Plaintiff Ronald Brown on the claims of sex discrimination under Title VII and 42 U.S.C. § 1983, and on the claim of race discrimination in the elimination of Plaintiff's job;

b. The motion is DENIED in all other respects;

3. That Plaintiff's Motion to Strike the Affidavits Attached to Defendants' Motion for Summary Judgment (Paper No. 26) is DENIED; and

4. That the Clerk of the Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/

William M. Nickerson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD A. BROWN	*
	*
v.	*
	*
JACQUELINE F. McLEAN, et al.	*

Civil Action No.WMN-95-387
Entered: February 26, 1997

MEMORANDUM

Before the Court is Plaintiff's Motion for Partial Summary Judgment, Paper No. 17; Defendants' Motion for Summary Judgment, Paper No. 18; and Plaintiff's Motion to Strike the Affidavits Attached as Exhibits to Defendants' Motion for Summary Judgment, Paper No. 26. Upon a review of the motions and the applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6). Plaintiff's motion for partial summary judgment will be denied. Defendants' motion will be granted in part and denied in part.[1]

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[1] Plaintiff's motion to strike the affidavits will be denied as moot due to the denial of that portion of Defendants' Motion for Summary Judgment to which the affidavits are relevant.

I. BACKGROUND

Plaintiff alleges that he was subject to an adverse employment action by the City of Baltimore because of his race (Caucasian) and gender. Plaintiff was employed as the Administrator of Telephone Facilities, a civil service position reporting to the Comptroller. The 1993 fiscal budget for the Comptroller's office did not include the position held by Plaintiff, but instead included a new position entitled the Director of Communication Services (DCS). The new position encompassed the duties previously held by Plaintiff as well as oversight of the City's post office. An African-American male named Rochelle Young was hired for the DCS position.

In Plaintiff's motion for partial summary judgment, Plaintiff argues that the above-described actions were taken pursuant to an unconstitutional affirmative action policy. Defendants argue in their motion for summary judgment that Plaintiff has failed to make out a prima facie case of discrimination regarding the abolition of his position by the Board of Estimates, regarding former Comptroller Jacqueline McLean's recommendation that Plaintiff's job be abolished, or regarding the fact that Plaintiff was not placed on the "re-employment list" for the new position. Defendants further assert that they did not discriminate against Plaintiff in

failing to hire him for the DCS position because Plaintiff never applied for that position.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the evidence before the court, consisting of the pleadings, depositions, answers to interrogatories, and admissions of record, establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Rule 56 mandates the entry of summary judgment against a party who, after reasonable time for discovery and upon motion, "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 332. "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial [and] [t]he moving party is 'entitled to judgment as a matter of law.'" Id. at 323. (citations omitted).

If the evidence favoring the non-moving party is "merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249-50 (1986) (citations omitted). Unsupported speculation is insufficient to defeat a

motion for summary judgment. Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (citing Ash v. United Parcel Serv., Inc., 800 F.2d 409, 411-12 (4th Cir. 1986). Moreover, the mere existence of some factual dispute is insufficient to defeat a motion for summary judgment; there must be a genuine issue of material fact. Anderson, 477 U.S. at 247-48. Thus, only disputes over those facts that might affect the outcome of the case under the governing law are considered to be "material." Id.

Finally, in assessing such a motion, the Court must view the evidence and all justifiable inferences in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). With these principles in mind, the Court will address the arguments presented by the parties.

III. ANALYSIS

This case is closely related to another case pending before the Honorable Frederic N. Smalkin of this court, Burtnick v. McLean, Civil Case No. S-94-3440. In Burtnick, another white male employee in the Comptroller's office also alleged that he was discriminated against on the basis of his race and gender by the City of Baltimore. Burtnick claimed that he was discriminated against when McLean recommended that his job be eliminated,

and when he was not hired for the position that was created to take over his former duties, which position was instead filled by a less-qualified African-American female.

The Court adopts in part Judge Smalkin's reasoning in his recent opinion, dated January 29, 1997, and thereby determines that Plaintiff's motion for partial summary judgment should be denied. As in Burtnick, there is no evidence in this case that the complained of actions were taken pursuant to the City's affirmative action policy. Therefore, the issue of whether that policy is constitutional is not properly before the Court.

As to Plaintiff's claims under 42 U.S.C. §§ 1981 and 2000e, which have been narrowed by Plaintiff to discrimination on the basis of race and gender,[1] the Court agrees with and also adopts Judge Smalkin's reasoning as to the issue of the elimination of Plaintiff's job, and grants summary judgment to Defendants on that issue. See Burtnick v. McLean S-94-3440, Jan. 29, 1997 slip op. at 4-5.

The court differs with Judge Smalkin's finding that Plaintiff's § 1983 claim is precluded by Title VII. As will be discussed below, unlike Burtnick, Plaintiff does not have a sex discrimination claim. Plaintiff's race

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[1] Of course, the gender discrimination claim sounds under 42 U.S.C. § 2000e only.

discrimination claim, however, may be brought under § 1983. Keller v. Prince George's County, 827 F.2d 952, 956-63 (4th Cir. 1987). In Hughes v. Bedsole, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995), cert. denied, 116 S. Ct. 190 (1995), decided after Keller and upon which Judge Smalkin relied in reaching the opposite result, the Fourth Circuit stated in the cited footnote that the plaintiff's sex discrimination claim under § 1983 was precluded by Title VII. It is not wholly surprising that there would be a different answer to the question of whether Title VII is an exclusive remedy depending on whether the issue is race or sex discrimination. Although there was no other federal statutory remedy for sex discrimination at the time Title VII was passed, race discrimination was at that time also redressed through the Reconstruction-era Civil Rights Act, 42 U.S.C. § 1981. Title VII did not do away with § 1981 as an alternative cause of action. Johnson v. Railway Express Agency, 421 U.S. 454 (1975). The same holds true for § 1983. Keller, supra; see also Zombro v. Baltimore City Police Dept., 868 F.2d 1364, 1370-71 n.5 (4th Cir.) (differentiating between race discrimination, where Title VII does not preclude a § 1983 claim for violations of the Fourteenth Amendment, and age discrimination where the ADEA would preclude such a claim), cert. denied, 493 U.S. 850 (1989). In the post-Hughes case of Causey v. Balog, 929 F. Supp. 900, 913

(D. Md. 1996), Chief Judge Motz wrote that

> although a plaintiff cannot directly circumvent Title VII's remedial scheme by predicating a § 1983 action on the rights created by Title VII, courts consistently have held that Congress did not intend by creating Title VII to preclude preexisting avenues of redress for employment discrimination such as § 1983 suits for Fourteenth Amendment violations.

Therefore, it is clear that Title VII is not an exclusive remedy for race discrimination, and Plaintiff's § 1983 claim is not precluded on that basis.

The Court is then left with the question of whether summary judgment should be entered for Defendants on the question of race and sex discrimination in the failure to hire Plaintiff for the DCS position. The plaintiff in a Title VII case must withstand the initial burden under the statute of establishing a prima facie case of racial discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. The plaintiff must then show that the employer's stated reason for the adverse employment action

was a mere pretext for discrimination. Id. at 804.

The purpose behind the passage of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." Id. at 800. Title VII also applies on the same terms to discrimination against males or whites, Hicks v. ABT Assocs., 572 F.2d 960 (3rd Cir. 1978), but where a plaintiff in an employment discrimination case alleges a case of "reverse discrimination," the prima facie case requirements are more onerous. Rather than showing that the plaintiff is a member of a protected class, the plaintiff must establish background circumstances which support the suspicion that the defendant is among those unusual employers who discriminate against the majority. See Green v. Clarendon County Sch. Dist. 3, 923 F. Supp. 829, 840 (D.S.C. 1996), and cases cited therein.

Defendant McLean's deposition transcript establishes that she made the decision regarding the hiring of Rochelle Young into the DCS position, acting on a recommendation she received from two members of her staff. Plaintiff's Ex. F at 116. Her deposition creates a genuine dispute of material fact on the issue of whether she is "among the unusual employers who discriminate against the majority." Ms.

McLean stated regarding Erwin Burtnick's termination that she was concerned about

> whether or not he would be able to represent me properly in the community. And the community being majority, the City is 68 percent black, that he had to represent me in a City that was predominantly black . . . As I said, I needed someone to represent me. I'm black. And I don't think Mr. Burtnick would be able, would even be able this day, to represent me in front of my community . . .

Id. at 120-21. Although McLean denies that this factor was relevant in her determination to hire Rochelle Young instead of Plaintiff for the DCS position, id. at 122, her comments regarding Burtnick are relevant to the question of whether she was motivated by a discriminatory intent when she made the decision not to hire Plaintiff. Furthermore, McLean explained that the fact that the composition of the work force in the Comptroller's office was predominantly white male was not acceptable to her because she sought diversity of "race, religion, sex, [and] heritage." Id. at 146.

Having generated at least a dispute of material fact as to whether McLean was the kind of employer who would discriminate against the majority,

Plaintiff must then complete the prima facie case by showing that he was qualified and applied for the position, was rejected, and that the position was held open or was filled by a member of a minority group. McDonnell Douglas, 411 U.S. at 802. The DCS position was created as the result of the elimination of Plaintiff's position as Administrator of Telephone Facilities. There is no dispute that the responsibilities of the new position included those which had been part of Plaintiff's job, as well as those of oversight of the City's post office. The new position was filled by Rochelle Young, an African-American male, who was "pre-hired" for the position, although he had not previously worked in City government.[1]

Because the person who was hired instead of Plaintiff was a male, there is no prima facie case of sex discrimination established on these facts. Summary judgment will enter for Defendants on the issue of sex discrimination.

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[1] There also appears to be a dispute of fact on this point as McLean claims that as of the time of Plaintiff's exit interview, the DCS position had not been filled. Plaintiff's Ex. F at 118. She further states that she encouraged Plaintiff to apply for the position. In ruling on Defendants' motion for summary judgment, the Court must assume as true Plaintiff's version of the facts. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 887 (1990).

Defendants argue that Plaintiff cannot make out a prima facie case of race discrimination because Plaintiff did not apply for the DCS position. Plaintiff claims that it would have been futile to apply where Young had been placed in the position prior to Plaintiff's even being placed on the City's reemployment list. A non-applicant plaintiff may still be entitled to relief under Title VII and § 1981 when the plaintiff shows that an application would have been a useless act serving only to confirm a discriminatee's knowledge that the job he wanted was unavailable to him. Hairston v. McLean Trucking Co., 520 F.2d 226, 231-33 (4th Cir. 1975) (cited approvingly in Teamster v. United States, 431 U.S. 324, 367-68 (1977)).

There is a further dispute over whether Plaintiff was qualified for the new Director position. Defendants present conflicting testimony on why Plaintiff was not placed on the preferred "reemployment list" for the position, stating that because the position was new, there was no reemployment list for it, but elsewhere stating that Plaintiff was not placed on the reemployment list for the position because the position included responsibilities which Plaintiff had not previously performed in his former job. Plaintiff did not have experience administering a post office, but neither did the individual who was selected to fill the new position. A reasonable

jury could thus find that experience with administering a post office was not necessarily a prerequisite for the DCS job.

Having determined that there are genuine disputes of material fact on the elements of Plaintiff's prima facie case, the Court must examine whether Defendants have articulated a legitimate non-discriminatory reason for the failure to hire Plaintiff for the DCS position. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747 (1993). Defendants primary claim is that Plaintiff was not hired for the DCS position because he did not apply for it. That allegation was discussed at 9 above.

Secondarily, it appears from McLean's deposition that there may have been performance-based reasons that Plaintiff was not hired for the position. Plaintiff's Ex. F at 105-13. McLean stated that she had difficulty locating Plaintiff, that his performance was "poor," and that his knowledge of the telephone system was "poor." When asked if she had documented these concerns in writing, she first said that she had not, and then later said that she had but that Plaintiff's personnel file had been stolen.

The evidence of legitimate non-discriminatory reasons for Defendants' failure to hire Plaintiff lacks credibility because of the inconsistency of McLean's testimony and because of her interest in the case. Moreover, McLean

would be subject to impeachment at trial on the basis of her felony theft conviction. Fed. R. Evid. 609.

In the Burtnick case, Judge Smalkin found that there may be sufficient direct evidence of discriminatory intent to merit a "mixed motive" instruction, which shifts the burden to the employer to prove that it would have reached the same determination without any discriminatory animus. 42 U.S.C. § 2000e-(m); Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995). Here, there would not be sufficient evidence to support a mixed motive finding because the possibly discriminatory statements quoted above from McLean were direct evidence as to Burtnick but only indirect evidence as to Plaintiff. See Fuller, 67 F.3d at 1142 (holding that not all evidence that is probative of discrimination will entitle the plaintiff to a mixed motive charge; evidence must bear directly on the contested employment decision). The indirect evidence is insufficient, however, to permit a reasonable jury to find that the asserted reasons for Defendants' actions were mere pretexts for discrimination. St. Mary's Honor Center, 113 S. Ct. at 2753.

In short, there are genuine disputes of material fact as to the elements of Plaintiff's prima facie case of race discrimination as well as to Defendants asserted reasons for the adverse employment action. These disputes are sufficient to preclude the

entry of summary judgment for Defendants on the issue of the failure to hire Plaintiff for the position of Director of Communication Services. To that extent, Defendants' motion for summary judgment will be denied. A separate order will issue.

/s/

William N. Nickerson
United States District Judge

Dated: February 25, 1997.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EDWIN A. BURTNICK

v.

JACQUELINE F. McLEAN,
et al.

Civil Action No. S94-3440
Filed: January 29, 1997
[Reported 953 F.Supp. 121]

DISPOSITION: Plaintiff's motion for partial summary judgment, DENIED; defendant's motion for summary judgment, DENIED in part and GRANTED in part. CORE TERMS: summary judgment, deposition, elimination, hired, sex discrimination, formally, claims asserted, comptroller, duties, affirmative action, employment decision, sex, legislative immunity, partial, hire, recommendations, abolished, budgetary, lawsuit, played, legitimate business reason, jurisdictional, hiring, gender discrimination, reasons stated, triable issue, prima facie, newly-created, preponderance, municipality

COUNSEL: Howard J. Schulman, Joseph S. Kaufman, SCHULMAN & KAUFMAN, LLC, Baltimore, MD, For Plaintiff.

John H. Morris, Jr., Baltimore, MD. James S. Ruckle, Jr., Senior Solicitor,

JoAnne Evans Anderson, Assistant Solicitor, Department of Law, Baltimore, MD, For Defendant.

JUDGES: Frederic N. Smalkin, United States District Judge

OPINION BY: Frederic N. Smalkin

OPINION: MEMORANDUM OPINION

This employment discrimination case has not run an easy course. After the Court granted the defendants' original motion for summary judgment on grounds of legislative immunity, the Fourth Circuit changed the law by its decision in Berkley v. Common Council of Charleston, 63 F.3d 295 (4th Cir. 1995)(en banc), cert. denied, U.S., 116 S. Ct. 775, 133 L. Ed. 2d 727 (1996). Applying the newly-decided Berkley case, the Fourth Circuit decided, on plaintiff's appeal from this Court's grant of summary judgment, that defendant McLean[1] was entitled to legislative immunity, but the City was not. Burtnick v. McLean, 76 F.3d 611 (4th Cir. 1996). Furthermore, the Fourth Circuit limited the scope of Berkley's overruling effect on prior law, viz., Baker v. Mayor and City Council of

[1] McLean, formerly the elected Comptroller of Baltimore City, left office in disgrace, having been guilty of felony theft of City funds.

Baltimore, 894 F.2d 679 (4th Cir. 1990), cert. denied, 498 U.S. 815, 112 L. Ed. 2d 31, 111 S. Ct. 56 (1990), by observing that "Berkley only overruled Baker's holding that municipalities enjoyed legislative immunity." Burtnick, 76 F.3d at 613 n. The Fourth Circuit found that no other aspect of Baker had been affected by Berkley. Id. The Fourth Circuit, finally, remanded for further proceedings as to the City of Baltimore.

There are a number of summary judgment motions pending on either side of this case, which will now be decided. No oral hearing is needed. Local Rule 105.6, D. Md.

In certain ways, oddly enough, the case has become simpler since the appeal was decided. That is, plaintiff now concedes that there is insufficient evidence to raise any claims of discrimination on the basis of age or religion, but he still presses claims of race discrimination (white) and sex discrimination (male). Thus, the complexity of the case has been reduced.

Another development in the law subsequent to the filing of this complaint also simplifies the case. The Fourth Circuit, in 1987, decided the case of Keller v. Prince George's County, 827 F.2d 952 (4th Cir. 1987), holding that a Section 1983 claim may be based on, inter alia, race or sex discrimination in employment by a municipality, and that such Section 1983 cases are not precluded by the existence of Title VII. In Zombro v. Baltimore

City Police Dept., 868 F.2d 1364, 1370-71, n.5 (4th Cir. 1989), cert. denied, 493 U.S. 850, 107 L. Ed. 2d 106, 110 S. Ct. 147 (1989), however, the Fourth Circuit, without any convincing rationale, held Keller inapplicable to ADEA cases, even though in virtually every other respect ADEA litigation is indistinguishable from Title VII litigation.

More to the point, the Fourth Circuit seems to have abandoned Keller al-together in Hughes v. Bedsole, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995), cert. denied, 133 L. Ed. 2d 126, 116 S. Ct. 190 (1995). Hughes was a public employee who, inter alia, brought a claim under 42 U.S.C. § 1983 alleging sex dis-crimination. In the footnote cited, the Fourth Circuit held, without citation to Keller, that the fact that Hughes originally could have instituted a Title VII cause of action precluded an action under Section 1983 for violation of the Fourteenth Amendment, citing, inter alia, Zombro and Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 60 L. Ed. 2d 957, 99 S.Ct. 2345 (1979).

Thus, this Court is left with con-flicting panel decisions of the Fourth Circuit, which can only be resolved by that court en banc, as this Court under-stands that court's internal operating procedures. Given that situation, the Court feels constrained to follow the more recent pronouncement of the Fourth Circuit in Hughes v. Bedsole. Thus, the

Court will enter summary judgment against the plaintiff on all claims asserted under 42 U.S.C. § 1983.

Plaintiff's claim under 42 U.S.C. § 1981 is not, however, similarly capable of adjudication as a matter of law. Section 1981, unlike Section 1983, is not a general vehicle for the assertion of violation of constitutional rights, see Hughes v. Bedsole, but is, as amended, a vehicle for redress of discrimination in employment, private or public. It is available to white persons as well as to non-whites. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976). The presence of the Section 1981 claim in this case is of little practical import, though, in that the standards for analyzing discrimination claims brought under Title VII and those brought under Section 1981 are identical. See, e.g., Blount v. Alabama Co-Op. Extension Service, 869 F. Supp. 1543, 1550 n.2 (M.D. Ala. 1994).

With these jurisdictional matters out of the way, the Court now turns to the substance of the pending motions.

The first issue that ought to be addressed is the plaintiff's motion for partial summary judgment on the ground that Baltimore City's affirmative action plans are unconstitutional under the criteria developed by the Fourth Circuit in Maryland Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072 (4th Cir. 1993). This Court does not believe that there is any need to adjudicate the validity

vel non of the Baltimore City Equal Opportunity and Affirmative Action Plan, because there is no evidence whatever that it was taken into account in any decision that is at issue in this lawsuit. (Further discussion of this issue will be set forth post.)

This conclusion is based upon an examination of just what employment decision is at issue in this lawsuit. It is clear that what is not at issue in this lawsuit is the elimination of Burtnick's old job of Assistant Comptroller. As noted above, the Fourth Circuit let stand so much of the decision in Baker v. Mayor and City Council of Baltimore, supra, as did not directly involve the issue of legislative immunity. Burtnick, 76 F.3d at 613 n. Turning to the Fourth Circuit's decision in Baker, the Court notes that the Fourth Circuit specifically held that recommendations for job eliminations from puisne officers, including the comptroller acting in his or her administrative role, are not "employment decisions" in cases involving -- as does this one -- budgetary job eliminations in Baltimore City. Baker, 894 F.2d at 681. That holding rules this case. The only discriminatory "adverse employment action" in connection with the budgetary elimination of the Assistant Comptroller job pointed to by Burtnick is the action of McLean (and unidentified members of her transition team) in recommending elimination of the job to the decision-making Board of Estimates. As Baker

holds, these recommendations are not within the compass of federal anti-discrimination-in-employment laws. When it comes to the only actionable claim under Baker, viz., the actual vote by the Board of Estimates to eliminate the Assistant Comptroller job, Burtnick has produced absolutely no evidence that his race or gender was in any way considered, or played any role whatever, in that decision. Without such evidence -- even if the recommendations from McLean and/or her transition team were racially motivated -- summary judgment must be granted for defendant on the job elimination issue, under Baker, supra. See Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

What remains, then, is plaintiff's claim that he was not hired for the scheduled position of Administrative Officer III (which later was translated to the exempt position of Executive Assistant to the Comptroller), on account of his race and/or sex.[2] Plaintiff has certainly presented a prima facie case on this issue under the analytical framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792,

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[2] There is no evidence that his failure to be hired as Auditor III was based on race and/or sex discrimination.

802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). That is, he has unquestionably shown that he was as qualified -- in fact, more qualified -- to be hired for the job as was the selectee (Ms. Goodman), from the standpoint of education and directly relevant job experience. He has shown that McLean considered, but rejected, him for the job, as will be more fully discussed post. He has also shown that the duties he performed as Assistant Comptroller were essentially identical to those performed in the newly-created Administrative Officer III position. He has, finally, demonstrated that the position was filled by someone who was not of his race and not of his gender, viz., Ms. Goodman, a black female.

The defendant argues that the plaintiff cannot make out a prima facie case, because he did not formally apply for the position. See defendant's opposition to plaintiff's motion for partial summary judgment, Exhibit D (Clayton Affidavit). Although, ordinarily, it is true that a formal application needs to be submitted to sustain a claim of disparate treatment by way of failure to hire, the Supreme Court has recognized that this is not an inflexible requirement. See Teamsters v. United States, 431 U.S. 324, 367-68, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977); see also McDonnell Douglas, supra, at 802 n. 13. In this case, there are uncontroverted facts indicating that Ms. Goodman, the person hired for the

Administrative Officer III position (retitled to Executive Assistant to the Comptroller on August 10, 1992), was "pre-hired." That is, McLean first contacted Ms. Goodman about the position in February, 1992, and Goodman was interviewed for it in April, 1992. She was told in May she would be hired. She was in fact appointed on July 1, 1992, the day Burtnick's old job was abolished and the Administrative Officer III position was established. (Burtnick, on the other hand, was not formally advised that his position was being abolished until McLean's letter to him of May 26, 1992.)

Because it appears that a formal application for the Administrative Officer III position would have been an exercise in futility given the "pre-selection" of Goodman, the fact that plaintiff did not formally apply for the job is beside the point, especially in that he was considered for it.

What is to the point, though, is whether there is a triable issue on race and/or sex discrimination in this case, under the Supreme Court's latest views on Title VII law, as expressed in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). In that case, the Supreme Court held that a race/sex discrimination plaintiff must carry the ultimate burden of proof on the issue of intentional discrimination by a preponderance of the evidence. If the employer brings forth evidence of a legitimate, Non-dis-

criminatory reason for the employment decision, then the employee is required to produce evidence generating a triable dispute on pretext, as well as to satisfy the ultimate burden of proof of intentional discrimination by a preponderance of the evidence. (In so-called "mixed motive" cases, see 42 U.S.C. § 2000e-2(m), the plaintiff need only prove that race and/or sex was a factor in the employment decision.)

In this case, the defendant has brought forth precious little evidence of a legitimate business reason for hiring Goodman as Administrative Officer III, a position in which Goodman performed virtually identical duties to those previously performed by Burtnick in the abolished job of Assistant Comptroller. Although the defendant apparently justifies Burtnick's non-selection in part on the basis of his failure formally to apply for the job, see Burtnick deposition at 159-60 (Exhibit C to defendant's opposition memorandum), a thorough reading of that deposition shows he was excluded from making formal application, because he did not get on the City's re-employment list until July 6, while Goodman had in fact assumed office on July 1. Furthermore, there was no opportunity for Burtnick to compete for the job in any practical sense, despite his many years of experience performing essentially the same duties assumed by Goodman, because Ms. Goodman was pre-selected. And, to make matters worse, in

early August, the job was reclassified to non-competitive status, under the title "Executive Assistant to the Comptroller," although it entailed essentially the same old duties. Thus, to the extent that plaintiff's failure to apply formally for the Administrative Officer III position is urged as a legitimate business reason for not hiring him, the plaintiff has pointed out sufficient evidence under St. Mary's Honor Center to show that the lack of a formal application was not a legitimate business reason for his non-appointment, but was simply a pretext. (In fact, McLean, according to her deposition, actually considered him for the job. McLean deposition at 120.)

The Court next moves to the question of whether there is sufficient evidence to warrant trial on the issue of race and/or sex discrimination in the decision to hire Goodman, rather than Burtnick, for the position of Administrative Officer III that was newly-created, largely succeeding to the duties performed by Burtnick.

There is no question that the hiring officer was McLean, and there is no question that the City is responsible for her actions under Title VII and Section 1981, even though she is personally out of the case.[3] Although

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[3] Liability under Title VII and Section 1981 rests on the employer, without the need for the "custom, practice, etc." analysis germane in Section 1983 cases.

there is evidence that McLean hired Goodman because she was a personal friend and worked in her campaign,[4] See McLean deposition at 91-92, and because Goodman was "knowledgeable about housing," id. at 92-94, there is virtually no evidence as to any relevant qualification she had for the job as Administrative Officer III as opposed to others, including Burtnick (who, it is to be remembered, had performed essentially the very functions assigned to the Administrative Officer III job for years, as Assistant Comptroller). As noted ante, McLean, despite Burtnick's failure to apply for the job formally, says she did consider putting him into the Administrative Officer III job. Id. at 120. Although McLean testified that there were a number of characteristics of Burtnick's that she did not like (including the fact that he carried a gun strapped to his ankle, that he did not get along with the immediate office staff, that she did not like his attitude towards City employees, and that she did not like the facts that he would "disappear" and that he would give himself "comp time"), McLean, on deposition, also said the following:

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[4] Cronyism has not yet been outlawed by Congress; racism and sexism have been.

> His performance, whether or not I felt comfortable, whether or not I trust him, whether or not he would be able to represent me properly in the community. And the community being majority, the City is 68 percent black, that he had to represent me in a City that was predominantly black.

McLean deposition at 120.

From this evidence, and from the fact that McLean's testimony on race-neutral reasons for Goodman's selection might well be subject to impeachment at trial on the basis of her felony theft conviction, see Fed. R. Evid. 609, a reasonable jury could conclude, consistent with St. Mary's Honor Center, either (1) that race was a factor in the decision to hire Goodman as opposed to Burtnick for the Administrative Officer III position even though other considerations would have resulted in his non-hire anyway,[4] or (2) that he was not hired for the Administrative Officer III position because of outright, intentional

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[4] This would be a violation of 42 U.S.C. § 2000e-2(m), for which there are no damages available (but attorney's fees can be awarded within the Court's discretion). See Sheppard v. Riverview Nursing Center, Inc., 88 F.3d 1332 (4th Cir. 1996), cert. denied, 117 S.Ct. 483 (1996).

discrimination on account of his race and/or sex. In either case, summary judgment cannot be granted for the defendant under Fed. R. Civ. P. 56, as interpreted in Celotex Corp. v. Catrett, supra, and Anderson v. Liberty Lobby, Inc., supra, consistent with St. Mary's Honor Center, supra.

Finally, the Court returns to the question of the City's affirmative action plan. There is insufficient evidence to generate a triable issue as to that plan, because there is no indication at all from the record of this case that McLean's decision to pass Burtnick over for the Administrative Officer III position had anything whatso-ever to do with any affirmative action plan in force in the City of Baltimore. Thus, any such plan simply played no role in any employment decision that is at issue in this case, including the budgetary elimination of the Assistant Comptroller job. It is clear from the relevant evidence -- the McLean deposition referred to above -- that only McLean's personal evaluations and preferences played a role in her decision not to hire Burtnick as Administrative Officer III, and that she followed no formal or informal City policy, custom, ordinance, or usage. Thus, there is no reason to complicate this case by going on to consider the validity vel non of the City's affirmative action policies.

For the reasons stated, an order will be entered separately, denying the

plaintiff's motion for partial summary judgment, denying in part and granting in part the defendant's motion for summary judgment, and granting summary judgment in favor of the defendant on all claims asserted under 42 U.S.C. § 1983 and all other claims asserted under any jurisdictional statute, except plaintiff's claims of race and gender discrimination in McLean's failure to select him for the position of Assistant Comptroller III.

A pretrial conference will be held on Friday, February 28, 1997 at 9:30 a.m. in lieu of the previously scheduled pretrial conference of June 17, 1997.

Frederic N. Smalkin
United States District Judge

Dated: January 29, 1997

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp.]

ORDER AND JUDGMENT

For the reasons stated in the foregoing Memorandum Opinion, it is, this 29th day of January, 1997, by the Court, ORDERED and ADJUDGED:

1. That plaintiff's motion for partial summary judgment, BE, and the same hereby IS, DENIED;
2. That defendant's motion for summary judgment, BE, and the same

hereby IS, DENIED in part and GRANTED in part, to wit, that summary judgment is GRANTED in favor of the defendant on all claims asserted under 42 U.S.C. § 1983 and all claims asserted under any jurisdictional statute other than plaintiff's claims of race and gender discrimination;

3. That a pretrial conference be held on Friday, February 28, 1997 at 9:30 a.m.; and

4. That the Clerk of Court mail copies of the foregoing Memorandum Opinion and of this Order and Judgment to counsel for the parties.

/S/_____
Frederic N. Smalkin
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RONALD A. BROWN	*
Plaintiff-	*
Appellant	*
v.	*
JACQUELINE F. McLEAN;	*
MAYOR AND CITY	*
COUNCIL OF BALTIMORE	*
Defendants-	*
Appellees	*

No. 97-1509
CA-95-387-WMN

Filed: December 8, 1998
Entered: December 8, 1998

On Petition for Rehearing and
Rehearing In Banc

The appellant filed a petition for rehearing and rehearing en banc.

Chief Judge Wilkinson voted to grant panel rehearing. Judges Ervin and Michael voted to deny.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Ervin for the Court.

For the Court,

/s/_____
Patricia S. Connor
CLERK

Plaintiff's Exhibit Number 12D, 03/07/89 "Policy Memorandum & Directive of Baltimore City concerning Equal Employment Opportunity and Affirmative Action (Identified 03/24/97, tr. 577), and Plaintiff's Summary Judgment Exhibit A (filed September 3, 1996)

POLICY MEMORANDUM AND DIRECTIVE
OF THE MAYOR
CONCERNING
EQUAL EMPLOYMENT OPPORTUNITY
AND
AFFIRMATIVE ACTION
ADOPTED MARCH 7, 1989

PART ONE: MEMORANDUM

The purpose of this Policy Memorandum is to advise all Departments, Agencies, Bureaus, Boards, Commissions and City Officials that the Mayor's Executive order of January 1, 1977 on Equal Employment Opportunity and Affirmative Action ("Executive Order") and the Baltimore City Equal Opportunity and Affirmative Action Plan ("Baltimore City Plan") adopted on March 29, 1984, are still in full force and effect. Neither the Executive Order nor the Baltimore City Plan expired in December, 1988 as widely rumored. They do not have expiration dates. Accordingly, the policies, programs and requirements of the Executive Order and the Baltimore City Plan shall be followed in accordance with the Directive set forth herein.

PART TWO: DIRECTIVE

All Departments, Agencies, Bureaus, Boards, Commissions and City Officials are directed to take the following action immediately unless otherwise noted:

a. Comply with the terms and provisions of the Executive Order and the Baltimore City Plan until you receive further instructions;

b. File a written report with the Chief of Equal Opportunity Compliance and the Personnel Director on the status of your affirmative action programs or plans. Copies of such programs or plans should be attached to your reports;

c. Notify all of your employees, and to the extent practicable inform all bidders, proposers, contractors and subcontractors under contract to your agency (unless they have already been notified) that the Executive Order, the Baltimore City Plan and all policies, programs and requirements of the Order and Plan are still in full force and effect and must be followed until further notice. The City Solicitor will help you to draft appropriate language for such a notice.

PART THREE: IMPACT OF THE RICHMOND CASE

As a result of the recent decision of the United States Supreme Court in the case of City of Richmond v. J.A. Croson Co., I have directed the Personnel Director and the Chief of Equal Opportunity Compliance to review all equal employment opportunity and affirmative action policies, programs and requirements of the City, and determine whether they are legally valid. They will be assisted by legal experts in the area of employment discrimination to me within the next 30 days.

While the review and evaluation are under way, you shall continue complying with all policies, programs and requirements of the City concerning equal employment opportunity, anti-discrimination and affirmative action. After the review and evaluation has been completed, I will notify you about any changes that will be made in our policies, programs or requirements.

PART FOUR: SUMMARY OF THE EXECUTIVE ORDER AND THE BALTIMORE CITY PLAN

The Executive Order declares the policy of equal employment opportunity in City employment and public contracting. It establishes programs and initiatives that must be implemented and maintained by City agencies to effectuate the policy. It also prohibits discrimination in the employment prac-

tices of the City and private contractors doing business with the City. A policy of affirmative action is also stated in the Executive Order. The goal of affirmative action is to increase the number of minorities and women in the work force of the City.

The Baltimore City Plan was adopted to supplement the policies, programs and requirements of the Executive Order. The Plan reflects the state of legal developments that occurred in the areas of employment discrimination and affirmative action between 1976 and 1984. The purpose of the Baltimore City Plan is "...to describe the application of key policies and procedures to assure the right of all persons to work and to advance on the basis of ability." It has the following goals:

> - to achieve the full use and equal treatment of minority groups and women at all levels and in all sections of the City's work force
> - to ensure compliance with the

Mayor's Executive Order [of January 1, 1977] on Equal Employment Opportunity and Affirmative Action and related city, state and federal equal employment laws and government regulations

> - to set forth mandatory steps to be taken by the City to maintain the existence of

equal employment and affirmative action policies.

Pursuant to the terms of the Plan,

(a) the Mayor has authority, consistent with his executive powers under the City Charter, to set policy for equal employment opportunity and affirmative action; and, (b) the Chief of Equal Opportunity Compliance, under the supervision of the City Solicitor, has overall responsibility for program planning, direction and operations. Those provisions modify and supersede the provisions of the Executive Order for a seven member Equal Opportunity Committee to set policy and oversee the administration of the program.

In order to be fully apprised of current policies, programs and requirements for equal employment opportunity and affirmative action, you must review the terms and provisions of the Executive Order and the Baltimore City Plan. Set forth below in Part Five is an extract of the Executive Order, and in Part Six is in extract of the Baltimore City Plan. The extracts have been updated by the Law Department.

PART FIVE: MAYOR'S EXECUTIVE ORDER OF JANUARY 1, 1977 ON EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION

WHEREAS, It is the policy of the City of Baltimore to assure that positions in public service are genuinely and equally accessible to qualified persons without regard to race, creed, color, national origin, sex or age.

WHEREAS, It is also the desire and intention of the City of Baltimore to additionally and specifically prohibit discrimination in City employment on the basis of political or religious opinion or affiliation, marital or parental status, or physical or mental handicap, unless the handicap can reasonably be considered to be a material and substantial impediment to the performance of the job.

WHEREAS, These objectives can best be implemented by the establishment of uniform guidelines to be followed by all City agencies and employees in prohibiting

discrimination in City employment on the basis of race, creed, color, national origin, sex, age, political or religious opinion or affiliation, marital or parental status, or physical or mental handicap; and by requiring the establishment, implementation, maintenance and supervision of Affirmative Action Plans in conformity with those guidelines by all City agencies and all contractors and subcontractors doing business with the City,

NOW, THEREFORE, * * * THE FOLLOWING EXECUTIVE ORDER [IS HEREBY PROMULGATED BY THE MAYOR] TO BECOME EFFECTIVE JANUARY 1, 1977.

ARTICLE I - ESTABLISHMENT OF THE EQUAL OPPORTUNITY COMMITTEE FOR THE CITY OF BALTIMORE

* * *

(NOTE: Provisions for the Equal Opportunity Committee were modified and superseded in the Baltimore City Equal Opportunity and Affirmative Action Plan adopted on March 29, 1984. Pursuant to the

provisions of the Plan, the Mayor sets policy for equal employment opportunity and the Chief of Equal Opportunity Compliance is responsible for program planning, direction and operations)

[Original Text Continued] It being the purpose and intent of this Executive Order that Affirmative Action Programs will best serve the goal of equal employment opportunity; it shall be the duty and responsibility of the [Chief of Equal Opportunity Compliance] to assist City Officials, Departments, Agencies, Bureaus, Boards and Commissions in establishing, implementing, maintaining and monitoring Affirmative Action Programs throughout City Government.

ARTICLE II - PROGRAM FOR EQUAL OPPORTUNITY IN CITY EMPLOYMENT

(A) City officials and supervisory employees shall appoint, assign and promote personnel on the basis of merit and fitness [unless they are in the Exempt Class]. Appointments, assignments and promotions shall be made without regard to (1) political or religious opinion or affiliation, marital status, race, color, creed, or national origin, or (2) sex, physical or mental handicap, or age, except when sex, handicap, or

age involves a bona fide job requirement. Personnel shall not be dismissed or in any way penalized on account of political or religious opinion or affiliation, race, color, sex, marital status, creed or national origin. Personnel shall not be dismissed or in any way penalized on account of age, except pursuant to a bona fide uniform retirement policy, or on account of physical or mental handicap unless the handicap is reasonably considered to be a material and substantial impediment to the performance of the job, in accordance with established merit system standards and grievance procedures.

(B) The [Mayor] shall be responsible for the overall policy[,] and [the Chief of Equal Opportunity Compliance shall be responsible for administration,] of the Equal Employment Opportunity Program for all City employees and applicants for City employment. The [Chief of Equal Opportunity Compliance], under the direction and supervision of the [Mayor] and the City Solicitor, shall assist the [Mayor] in developing, promulgating and recommending and initiating enforcement of all rules, regulations and guidelines necessary for the implementation of the said program.

These rules, regulations and guidelines shall comply with and adhere to Title VI and Title VII of the Civil Rights Act of 1964 as amended by the Equal Opportunity Act of 1972; the Equal Pay Act of 1963; the Age Discrimination in Employment Act of 1967; Executive Order 11246, as amended, Executive Order 11375, Executive Order 11625, Minority Enterprises, Executive Order 11914, Federal Management Circular 74-7, the State and Local Fiscal Assistance Act of 1972, Article 4 of the Baltimore City Code and all other applicable Federal, State and municipal rules, regulations and orders as enacted and promulgated from time to time.

(C) Each City Agency, Board or Commission under the authority of Municipal Government shall comply with the rules, regulations and guidelines issued by the [Mayor] and shall prepare and implement an Affirmative Action Plan in accordance with them.

(D) The [Chief of Equal Opportunity Compliance] shall review [, and with the advice of the Maycr shall] approve each agency's Affirmative Action Plan. After its approval periodic progress reports in addition to semi-annual reports may be required.

(E) The Civil Service Commission, subject to periodic review of the [Chief of Equal Opportunity

Compliance] shall undertake a study of current tests and other employee selection techniques utilized by the Civil Service Commission in an effort to determine whether any test or any other selection technique has a discriminatory impact on the employment and promotion of minority groups and women and/or other protected classes.

Upon completion of its review of the study the [Chief of Equal Opportunity Compliance] shall report its findings and recommendations to the Mayor and shall initiate or recommend any administrative steps consistent with this policy and existing law, necessary to rectify any adverse impact found by said study.

ARTICLE III - EQUAL EMPLOYMENT OPPORTUNITY PROGRAM FOR CITY CONTRACTORS

(A) All bid documents for City contracts, and the contracts them-selves, shall require compliance with all the provisions of Article 4, Section 10, of the Baltimore City Code (1966 Edition) relating to unlawful employment practices.

(B) All bid documents for City contracts, and the contracts themselves, shall include clauses which prohibit discrimination by a con-tractor against any employee or

applicant for employment because of race, creed, color, sex, national origin, political or religious affiliation, age or handicapped status.

(C) In addition, the bid documents for City contracts, and the contracts themselves, shall contain clauses requiring the bidder, the contractor, and all sub-contractors to develop, maintain and pursue an Affirmative Action Program directed at increasing the utilization of women and minority groups at all levels of the bidder's, contractor's and subcontractor's work force.

(D) Affirmative Action steps shall be taken by each contracting agency to insure the utilization of minority and female owned businesses as consultants, service, supply and construction contractors. [NOTE: This provision has been superseded by City Council Ordinance 790, Sections 217 et seq. of Article I, Baltimore City Code (1983 Rep. Vol. 1987 Cum. Suppl.)]

(E) The Affirmative Action Plan referred to in Paragraph C shall minimally include, but not be limited to, written provisions and procedures for each of the following:

(1) Formal internal and external dissemination of the contractor's equal opportunity policy.

(2) Establishment of responsibilities for implementation of the contractor's Affirmative Action Program.

(3) Identification of problem areas by organizational unit and job classification.

(4) Establishment of goals and objectives by organization unit and job classification, including timetables for completion.

(5) Development and execution of ongoing education and training programs designed to attain established goals and objectives.

(6) Maintenance of records and reporting systems geared to allow measurement of the effectiveness of the contractor's Affirmative Action program.

(7) Provisions for the active recruitment of minorities and women.

(8) Monitoring of personnel activities to insure that the contractor's equal employment opportunity policy is being carried out.

(F) In the event of the contractor's noncompliance with any of the applicable non-discriminatory provisions of this Executive Order or with any of the rules, regulations, or orders issued

pursuant thereto, the contract may be canceled, terminated or suspended in whole or in part by the contracting agency and the Board of Estimates and the contractor may be declared ineligible for participation in further City contracts.

ARTICLE IV - EMPLOYMENT REFERRAL AND PLACEMENT

All City agencies engaged in employment referral and placement service for private industry or public agencies shall fill all job orders on a non-discriminatory basis, and shall decline any job order carrying a specification or limitation as to political or religious opinion or affiliation, marital status, race, color, creed, or national origin, or as to sex, age, physical or mental handicap unless related to a bona fide job requirement or fulfillment of an affirmative action goal.

ARTICLE V - COOPERATION WITH THE BALTIMORE COMMUNITY RELATIONS COMMISSION AND THE [CHIEF OF EQUAL OPPORTUNITY COMPLIANCE]

(A) All City agencies, in accordance with the provisions and intent of the City Charter, and the City's laws against discrimination shall cooperate fully with the

Baltimore Community Relations Commission, and the [Chief of Equal Opportunity Compliance] and duly comply with [all] validly adopted rules, regulations, guidelines and directives for effectuating the City's policy against discrimination.

(B) In order to implement the monitoring function of the [Chief of Equal Opportunity Compliance] as set forth in Article I, Paragraph 2 of this Executive Order, all City agencies receiving a complaint of discrimination based on political or religious opinions or affiliation, marital status, physical or mental handicap, race, color, creed, national origin, sex or age shall promptly advise the [Chief of Equal Opportunity Compliance] if the complaint involves alleged discrimination in City employment or by the holders of City contracts for construction, supplies or services.

The [Chief] will immediately notify the Community Relations Commission of the existence of all City employment complaints.

ARTICLE VI - REPORT RESPONSIBILITY AND ANNUAL REPORTS

The [Chief of Equal Opportunity Compliance] shall report annually to the Mayor, by January 1, all activities undertaken in the

previous year to effectuate the provisions of this Executive Order.

ARTICLE VII - PUBLICATION OF EXECUTIVE ORDER

Copies of this Executive Order shall be distributed to all City officials, Departments, Agencies, Bureaus, Boards and Commissions and copies shall be posted in conspicuous locations in all City facilities. When Affirmative Action Programs are drafted, approved and adopted, copies of same shall be distributed to all Departments, Agencies, Bureaus, Boards or Commissions and a copy posted in a conspicuous location in said Department, Agency, Bureau, Board or Commission and a copy maintained on file with the [Chief of Equal Opportunity Compliance].

PART SIX: BALTIMORE CITY EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION PLAN OF 1984
POLICY STATEMENT

It is the policy of the City of Baltimore to provide equal opportunity in all employment practices including but not limited to recruitment, advertising, hiring, layoffs, rate of pay, training, termination, upgrading, demotion, transfer, fringe benefits, and use of facilities,

without discrimination because of race, color, religion, sex, national origin, age, handicapped status, Veteran's status, or other basis prohibited by law.

Equal Employment Opportunity, as defined in the Mayor's Executive Order [of January 1, 1977] on Equal Opportunity and Affirmative Action and other governmental regulations, requires affirmative steps to ensure the full utilization and nondiscriminatory treatment of minorities and women in the work force. It is our intention to adhere to both the letter and the spirit of these laws and regulations. This Plan sets forth our present interpretation of the course of action the City must take in order to fulfill its intention to meet, fully, its lawful obligations.

This Plan will be revised and updated in the light of experience, revised laws and regulations and their evolving interpretation, and better understanding of effective approaches that will assure truly equal employment opportunities for all. Any questions relating to details of this Plan should be referred to the [Chief of Equal Opportunity Compliance].

[APPROVED: MARCH 29, 1984 by the Mayor]

I. PURPOSE OF EQUAL EMPLOYMENT AND AFFIRMATIVE ACTION PLAN AND STATEMENT OF POLICIES

A. Purpose of Plan

The purpose of the Baltimore City Equal Employment and Affirmative Action Plan is to describe the application of key policies and procedures to assure the right of all persons to work and to advance on the basis of ability. This Plan has been developed by the City for the following reasons:

1. to achieve the full use and equal treatment of minority groups and women at all levels and in all sections of the City's work force;
2. to ensure compliance with the Mayor's Executive Order on Equal Employment Opportunity and Affirmative Action, effective January 1,

1977, and related City, State and Federal equal employment laws and government regulations;

3. to set forth mandatory steps to be taken by the City to maintain the existence of equal employment and affirmative action policies.

B. General Policies

Equal Employment - Baltimore City's employment policy is to make no distinction in treatment, hiring, or advancement on the basis of race, religion, color, sex, age, national origin, handicapped status, Viet-nam-era or disabled Veteran's status, or on any other basis prohibited by law.

Affirmative Action - The Mayor and City Council of Baltimore and all management personnel will affirmatively implement the policies and procedures in this Plan with regard to minorities and women, and will regard those policies and procedures as requirements for the

sound administration of the legal business of Baltimore City.

II. DISSEMINATION OF THE PLAN AND POLICIES

A. Internal

The City will communicate to its employees the equal employment and affirmative action policies through the following procedures:

1. Upon request, any employee may receive a copy of the Plan.
2. The existence and requirements of the Plan will be communicated to all employees, from time to time, through internal agency notices as may be appropriate.
3. Implementation of the Plan will be discussed during cabinet and other management meetings.
4. All unions with memoranda of understanding with the City will be noti-

fied of the equal opportunity policy.

B. External

The City will communicate the Plan and the Statement of Policies to the public by the following procedures:

1. Recruiting sources in Baltimore City such as community organizations, colleges, training institutes, and public and private employment agencies will be informed of the basic aims of the Plan and the Statement of Policies and will be requested to include minorities and women in their referrals.
2. Advertisements for employment will be placed in news media chosen to reach all qualified candidates, including minorities and women. All employment advertisements will contain the phrase, "An Equal Opportunity Employer."

3. The City's recruitment and hiring practices will include:

(a) the avoidance of employment advertising in sex - segregated columns in newspapers or other publications,

(b) the avoidance in recruitment letters, or other materials of any reference to "male" or "female" or any indication of preference for men or women in certain jobs.

III. ADMINISTRATION

The Mayor of the City of Baltimore has the overall responsibility for the policies included in this Plan.

A. Department of Law

The City Solicitor has the primary responsibility for the successful implementation of

the Plan. The City Solicitor has delegated to the Equal Opportunity Compliance Office the responsibility for program planning, direction, and operation. In performing all duties related to the Plan, the Equal Opportunity Compliance Office is under the direct supervision of and is a direct representative of the City Solicitor.

B. Equal Opportunity Compliance Office

1. The Equal Opportunity [Compliance] Office is a part of the administrative section of the Department of Law. Headed by the [Chief of Equal Opportunity Compliance] the office is responsible for developing, recommending, and administering policies and programs to overcome problems of discrimination in City government and expanding business

opportunities for women and minority entrepreneurs to assure that they have the maximum opportunity to participate in the performance of Baltimore City contracts.

2. In addition, the Equal Opportunity [Compliance] Office has the responsibility to require that all necessary action is taken by each Baltimore City Governmental Agency to achieve the objectives in the Baltimore City Affirmative Action Plan.

3. Duties of the Equal Opportunity Compliance Office Staff

(a) Assists agencies in developing and implementing equal opportunity and affirmative action plans in accordance with application re-

gulations and guidelines;

(b) Manages, coordinates, and integrates day-to-day operations and activities in implementing the Equal Employment and Affirmative Action Plan;

(c) Assists City contractors to establish and maintain equal employment and affirmative action plans for securing compliance with City, State, and Federal compliance provisions;

(d) Maintains broad oversight of activities and operations under the City Plan through close coordination with equal opportunity representatives in

City government agencies;

(e) Prepares and is-sues statistical data and evaluation of progress in equal opportunity and affirmative action to monitor personnel hiring patterns and the utilization of minority enterprises within City agencies;

(f) Advises the City Solicitor of new federal, state, and local requirements relating to equal employment opportunity and affirmative action policies, and recommends any program changes that should be made as a result of those requirements;

(g) Handles discrimination complaints filed

by City employees.

IV. EXECUTION OF THE EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

A. Recruitment

The major recruitment for the City is done by the Civil Service Commission. The Commission will continue actively to seek minorities and women for employment at all levels in the work force. The following techniques will be used to ensure that City personnel practices are not discriminatory:

1. The Commission will analyze and review recruitment procedures and job specifications to identify and eliminate discriminatory barriers;
2. Recruitment sources will be chosen to ensure that the contact is being made with the widest range of potential applicants;
3. Advertisements for employment will be placed in news media

chosen to reach all qualified persons, including minorities and women. All employment advertisements will contain the phrase, "An Equal Opportunity Employer;"

4. A continuing relationship will be established with referral sources likely to produce the widest possible pool of qualified applicants including women and minorities;

5. The City's employment application will notify the applicant that discrimination on the basis of race, color, religion, sex, national origin, age, handicapped status, Vietnam-era or disabled Veteran's status is prohibited.

B. Selection Standards and Procedures

When a list of eligible job candidates is received from the Civil Service Commission, the agency will conduct structured, job-related interviews of the candidates. All interviewers will be thoroughly familiar with the requirements of the job and trained in proper interviewing techniques. Candidates are entitled to reasons for non-selection and such information should be noted on agency records and reported to the Civil Service Commission. All placements and promotions will be made on the basis of individual ability, performance and the staffing needs of the City consistent with the commitment to affirmative action set forth in this Equal Employment and Affirmative Action Plan. Placement, promotion, and transfer activities at all levels will be monitored to assure that full consideration, as required by City policy, has been given to all qualified minority and women employees.

C. Upward Mobility, Promotions, Training

In order to assure the absence of discrimination against the employment of minorities and women in all positions, the City will review all practices - both formal and informal - affecting promotions and training in professional and non-professional positions. The following records and procedures will be used, developed, and implemented to insure compliance:

1. All promotional and training activities will be monitored to assure that full consideration has been given to all qualified minority and women applicants and employees;
2. Access to training and educational programs to which Baltimore City gives support or sponsorship will be without regard to race, religion, color, sex, age, national ori-

gin, handicapped status, Vietnam-era or disabled Veteran's status, or on any other basis prohibited by law.

D. Layoffs, Discharge, Disciplinary Action

The standards for deciding when an employee will be terminated, demoted, or disciplined will be the same for all employees and will not be applied differently for minorities and women. Each Department will keep records and provide information as needed regarding:

1. All Terminations, including total, name, date, number of members of minority groups and women by job category and reason for termination; and
2. All Layoffs and Demotions, indicating total, name, date, number of members of minority groups and women by job category and reasons for action.

E. Departmental EEO Complaint Procedure

Each Department will develop and implement an employee complaint procedure that will:

1. Provide orderly methods for the prompt and peaceful settlement of complaints;
2. Create simple but authoritative routes for the disposition of employee complaints and problems; and
3. Establish, over a period of time, the basic Department rules, practices, interpretations, and customs for the successful operation of a complaint procedure and conciliation process.

V. AUDITS AND REPORTS

The Equal Opportunity Compliance Office will monitor all appropriate personnel records and reports to ensure a policy of equal opportunity and to ensure compliance with goals and timetables.

The Equal Opportunity Compliance Office will develop and implement a reporting procedure that will provide for the continued auditing, monitoring, and evaluation of each City Agency.

VI. WORK FORCE AND UTILIZATION ANALYSIS

A. Work Force Analysis

The City will make every good faith effort to achieve full utilization of minority and women employees. As part of this effort, the Equal Opportunity Compliance Office will maintain an analysis of job categories including the wage rate or salary range within each agency ranked from the lowest paid to the highest paid, and the total number of incumbents by sex and minority group in each category.

B. Utilization Analysis

The purpose of the utilization analysis is to identify job categories within the City's work force in which minorities and women are being underutilized. The Equal

Opportunity Compliance Office will review job categories where few minority persons and women are presently employed and seek to determine the cause of the low representation. If the low representation is not due to low availability of women and minority persons with required skills, affirmative commitments will be undertaken to remedy the underutilization. The City will evaluate the following factors to determine if there is an underutilization of minorities and women:

1. The minority and female populations in the City of Baltimore and their proportion to the total;
2. The size of the minority and female unemployment force in the City of Baltimore;
3. The general availability of minorities and women having requisite skills in the geo-

graphic area where the City can reasonably be expected to recruit for the job classifications involved;

4. The minorities and women employed by the City with the requisite skills for the job classifications involved.

C. Identification of Problem Areas

[The Chief of Equal Opportunity Compliance] with the assistance of the Civil Service Commission will be responsible for the periodic analysis of the entire employment process in order to identify problem areas. Among the subjects covered will be:

1. The recruitment process;
2. Concentration of women and minorities in various job titles and job classifications;
3. Selection standards and procedures;

4. Upward mobility systems, promotions, and training;
5. Wage and salary structure;
6. Terminations and disciplinary actions.

VII. GOALS AND TIMETABLES

The final step in the work force and utilization analysis where there is an underutilization of minorities and women is the establishment of goals and timetables to remedy the underutilization.

1. The establishment of minority and female hiring goals shall not require the exclusion from consideration of any applicant for employment. The law does not permit, nor does the existence of this Plan mandate a quota sys-tem for hiring based on race, color, religion, sex, national origin, handicapped status, or Veteran status, or on any other basis prohibited by law;
2. For each salary range with a goal, a 3-5 year timetable has been est-

ablished for achieving said goal.

AGENCY: CITY OF BALTIMORE

SALARY LEVELS	NUMBER BUDGETED POSITIONS	CURRENT EMPLOYEES Minorities	Females	3-5 YEAR PROJECTION FOR MINORITIES AND FEMALES	MINORITIES	FEMALES
33,000+	310	37	29	81	57	24
25.0-32.9	766	126	119	194	137	57
20.0-24.9	1,829	407	258	274	178	96
16.0-19.9	5,064	1,203	648	501	343	158
13.0-15.9	2,957	1,621	953	102	35	67
10.0-12.9	3,215	2,038	1,065	24	1	23
TOTAL	14,241	5,432	3,072	1,176	751	425

It is understood that each agency chart is presumed to be a part of this comprehensive plan.
Thus, the method of achieving the goals is designated on charts for the individual agencies.

VII. CONTRACT ADMINISTRATION

* * *

[see, the provisions of the Executive Order and City Council Ordinance 790]

PART SEVEN: CONCLUSION

Should you have any questions or need additional information about (a) this Policy Memorandum, (b) my Directive, (c) the Mayor's Executive Order of January 1, 1977 on Equal Employment Opportunity and Affirmative Action, or (d) the Baltimore City Equal Opportunity and Affirmative Action Plan of 1984, please contact Mrs. Lola M. Smith, Chief of Equal Opportunity Compliance, at 396-4355.

ADOPTED:
MARCH 7, 1989

/s/
By:
Kurt L. Schmoke
Mayor

ENDORSEMENT:

The terms and provisions of the aforegoing Policy Memorandum and Directive of the Mayor Concerning Equal Employment Opportunity and Affirmative Action were reviewed and considered by the undersigned, and approved as to form and legal sufficiency.

/s/

NEAL M. JANEY
CITY SOLICITOR

ATTEST: /s/

G. LOUISE GREEN
ALTERNATE CUSTODIAN OF
THE CITY SEAL

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C., § 1981. (Equal rights under the law)

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 2000e-2.

(a) Employer practices. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices. It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs. It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religions. Not-

withstanding any other provision of this title [*42 USCS §§ 2000e* et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning

is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations. As used in this title [*42 USCS §§ 2000e* et seq.], the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security. Notwithstanding any other provision of this title [*42 USCS §§ 2000e* et seq.], it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be

performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions. Notwithstanding any other provision of this title [*42 USCS §§ 2000e* et seq.], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race,

color, religion, sex or national origin. It shall not be an unlawful employment practice under this title [*42 USCS §§ 2000e* et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended *(29 U.S.C. 206*(d)).

(i) Businesses or enterprises extending preferential treatment to Indians. Nothing contained in this title [*42 USCS §§ 2000e* et seq.] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance. Nothing contained in this title [*42 USCS §§ 2000e* et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [*42 USCS §§ 2000e* et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of

persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) (1) (A) An unlawful employment practice based on disparate impact is established under this title only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B) (i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the

complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title [*42 USCS §§ 2000e* et seq.], a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act *(21 U.S.C. 802*(6)), other than the use or possession of a drug taken under the

supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Except as otherwise provided in this title [*42 USCS §§ 2000e* et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) (1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the

circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

Rule 403 of the Federal Rules of Evidence (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time).

Although relevant, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Article VII, § 118 of the Baltimore City Charter (1964 Rev.) CIVIL SERVICE COMMISSION - DISCHARGE, RE-EMPLOYMENT, PART-TIME EMPLOYEES.

(a) No person shall be discharged from the Classified Civil Service or be reduced in pay or position or suspended by the appointing officer for or on account of his political opinions or affiliations, or for refusing to contribute to any political fund or refusing to render any political service; but nothing in the provisions of the Charter relating to the Classified Civil Service shall forbid the removal, dismissal, reduction or suspension of any such officer or employee for any cause, other than those here-in-before enumerated, which, in the opinion of the person authorized by law to remove or dismiss such officer or employee, may interfere with the efficient discharge of the duties of the position. In all cases of discharge, reduction or suspension for more than thirty days the appointing officer shall furnish the sub-ordinate so discharged, reduced or suspended, and also the Commission, a copy of the order of discharge, reduction or suspension and also his reasons for such action. The Commission may in all cases, and, upon the written request of any subordinate discharged, reduced or suspended after the termination of the probationary period, shall investigate, and if it shall find that the intent and spirit of the provisions of the Charter

have been violated in such discharge, reduction or suspension, it shall report its findings to the Mayor, and such findings so reported shall be sufficient cause for the removal by him of the officer guilty of such violation.

(b) Each person discharged for the purpose of reducing the force and without fault upon his part shall receive a certificate so stating and all persons so discharged shall be placed on the eligible list in the order of the length of their service in their classifications at the time of being laid off and in other classifications in the Classifications in the Classified Civil Service in which they may have served previously. The weight to be given to length of service in their last classification and in prior classifications shall be determined in accordance with the rules of the Commission. Persons so discharged shall have preference in the order of their seniority over others on the eligible list, subject, however, to the terms of the next paragraph and to any priority to which any person may be entitled by virtue of any preference to veterans or their dependents.

(c) In the case of any or all classes of seasonal or part-time employees the Commission may, from time to time, adopt, amend or rescind rules providing for their exclusion from the application of the provisions of the preceding paragraph for placing the names of laid-off employees on eligible

lists and for according preference to such employees over others on such lists, or rules limiting the application of such provisions to such employees. No such rule shall, however, be adopted, or amended so as to extend its duration or the classes of employees covered thereby, except after public notice and hearing as provided in Section 116 and upon a finding of the Commission that the adoption of such a rule or amendment will be in the public interest, which finding, together with a statement of the reasons therefor, shall be recorded in the minutes of the Commission and included in its annual report.

Article VII, §121 of the Baltimore City Charter (1964 Rev.)(Civil Service Commission - holder of abolished position):

> Any person holding any position in the Classified Civil Service which may be abolished by the adoption of any amendment to the Charter or in any other lawful manner, shall be placed upon the re-employment list for the classification to which such abolished position belonged in accordance with Section 118; or if no position of the same classification as that of the position abolished shall remain in the Classified Civil Service after the adoption of such amendment, he shall be placed on the reemployment list for such position as, in the judgment of the Civil Service Commission, shall most nearly approximate the position abolished. No position shall be deemed to be abolished by reason of being transferred or placed in or under a different municipal agency without substantial change in the nature of the actual duties of such position.

Supreme Court, U.S.
FILED
APR 1 1999
CLERK

No. 98-1430

In The

Supreme Court of the United States

October Term, 1998

RONALD A. BROWN,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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1688

QUESTIONS PRESENTED

I. DOES THE CITY OF BALTIMORE'S AFFIRMATIVE ACTION PLAN CONSTITUTE AN OFFICIAL POLICY, PRACTICE, OR CUSTOM UNDER 42 U.S.C. §§ 1981 AND 1983 ALTHOUGH IT BEARS NO NEXUS TO THE ACTIONS CHALLENGED IN THIS CASE?

II. DOES THE CITY OF BALTIMORE'S AFFIRMATIVE ACTION PLAN CREATE AN INFERENCE THAT IT WOULD HAVE BEEN FUTILE FOR THE PETITIONER TO APPLY FOR EMPLOYMENT ALTHOUGH IT BEARS NO NEXUS TO THE ACTIONS CHALLENGED IN THIS CASE?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

REASONS THE WRIT SHOULD BE DENIED 5

I. THE COURT OF APPEALS HELD CORRECTLY THAT SINCE THE AFFIRMATIVE ACTION PLAN BORE NO NEXUS TO THIS CASE, THE PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT 5

II. THE COURT OF APPEALS HELD CORRECTLY THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF THE AFFIRMATIVE ACTION PLAN AT TRIAL 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988) 8

Bishopp v. District of Columbia, 788 F.2d 781 (D.C. Cir. 1986) 7, 9, 10

Burtnick v. McLean, 953 F.Supp. 121 (D.Md. 1997) 3

Canham v. Oberlin College, 666 F.2d 1057 (6th Cir. 1981), *cert. denied*, 456 U.S. 977 (1982) 7, 9

Cerrato v. San Francisco Comm. College Dist., 26 F.3d 968 (9th Cir. 1994) 6, 9

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 6

Dennis v. County of Fairfax, 55 F.3d 151 (4th Cir. 1995) 7

Franks v. Bowman Transp. Co, Inc., 424 U.S. 747 (1976) 10, 11

General Elec. Co. v. Joiner, 118 S.Ct. 512 (1997) 8

International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977) 11

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) 6

Lanphear v. Prokop, 703 F.2d 1311 (D.C. Cir. 1983) 7, 9, 10

Lewis v. Alamance County, N.C., 99 F.3d 600 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1820 (1997) 8

McQuillen v. Wisconsin Educ. Ass'n Council, 830 F.2d 659 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988) 7, 9

Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658 (1978) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

42 U.S.C. § 1981 1

42 U.S.C. § 1983 1

42 U.S.C. § 2000e-2 1

Federal Rules of Civil Procedure 61 8

Federal Rules of Evidence 103(a) 8

STATEMENT OF THE CASE

The Petitioner seriously misrepresents the facts of this case without providing citations to the record. Although the facts are largely irrelevant given the issues presented for review, the Respondent will correct the Petitioner's more egregious errors with citations to the Joint Appendix submitted to the Court of Appeals.

In his Complaint, the Petitioner alleged that the Respondent violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and 42 U.S.C. §§ 1981 and 1983 by abolishing his position and not rehiring him on the basis of race. The United States District Court for the District of Maryland granted the Respondent's motion for judgment at the close of the Petitioner's evidence at trial. The United States Court of Appeals for the Fourth Circuit affirmed.

The Petitioner, a white man, supervised the Municipal Telephone Exchange as Administrator of Telephone Facilities in the Baltimore City Comptroller's Office. (J.A. 583.) Jacqueline F. McLean, a black woman, won the election for City Comptroller in November of 1991 and appointed a transition team to assist her in assuming the office as the first new Comptroller in twenty-eight years. McLean adopted the recommendation of the transition team, (J.A. 931, 935), that the Administrator of Telephone Facilities position be abolished and a new position, Director of Communication Services, be created to supervise both the Municipal Telephone Exchange and the Municipal Post Office. The Budget Office concurred and forwarded the recommendation to the Board of Estimates,

which abolished the Petitioner's position and created the new position. (J.A. 543-44, 1070-77.)

McLean advised the Petitioner of the Board of Estimates' action by letter on May 26, 1992. (J.A. 902.) As the holder of an abolished position, the Petitioner was entitled to have his name placed on a reemployment list for the position which, in the judgment of the Civil Service Commission, most closely approximated his prior position. (J.A. 1060.) The Civil Service Commission placed the Petitioner on the reemployment list for Telephone Supervisor and so notified him. (J.A. 1078.) The Petitioner never contacted the Civil Service Commission to discuss his placement on that list, even though he could have spoken to an advisor about his situation. (J.A. 622, 1033.)

Rochelle Young, a black man, was provisionally appointed as Director of Communication Services on July 1, 1992. This appointment, contrary to the Petitioner's bald assertion, (Pet. for Writ of Cert. at 5), was entirely appropriate, and there is no evidence to the contrary. As a provisional appointment, Young had to compete with other applicants for the position. (J.A. 345, 431, 890.) The City posted the job announcement for Director of Communication Services at the Civil Service Commission, (J.A. 899-90), and advertised in the Baltimore Sun newspaper from August 24 through September 11, 1992, (J.A. 898). The Petitioner never applied for the job, (J.A. 617-18), even though McLean encouraged him to do so, (J.A. 560, 606, 618). Contrary to the Petitioner's assertion, (Pet. for Writ of Cert. at 6), it was Shirley Williams, then Deputy Comptroller and Appointing Officer, (J.A. 962), who interviewed the competitors for the position and

recommended that Young be hired permanently as Director of Communication Services. There was no evidence that McLean did anything more than acquiesce in Williams' decision.

The Petitioner asserts that McLean told Bertram Finkelstein that he could not apply for the position of Audit Manager. (Pet. for Writ. of Cert. at 7.) Actually, after his position as Deputy City Auditor was abolished, Finkelstein continued working for the City as Audit Manager with the same responsibilities and salary until he retired voluntarily. (J.A. 323-24.) The Petitioner also asserts that McLean did not hire any white men during her tenure. (Pet. for Writ. of Cert. at 10.) In reality, McLean hired Arthur Held, a white man, as Real Estate Officer on April 20, 1992. (J.A. 70, 384, 1013-17.)

The Petitioner filed a charge with the Equal Employment Opportunity Commission (EEOC) on February 3, 1993. (J.A. 881). The EEOC issued a Determination finding no reasonable cause to believe that Title VII had been violated. (J.A. 883-84.) The Petitioner then filed a Complaint in the District Court against the Mayor and City Council of Baltimore and Jacqueline F. McLean in her official capacity as Comptroller.

The Petitioner filed a motion for partial summary judgment asking the trial court to hold that the Respondent's Affirmative Action Plan violated Title VII and the Fourteenth Amendment. (J.A. 26-54.) The trial court denied the Petitioner's motion. (J.A. 77-89.) Adopting the reasoning of the parallel case of *Burtnick v. McLean*, 953 F.Supp. 121, 124 (D.Md. 1997), the trial court held that "there is no evidence in this case that the complained of

actions were taken pursuant to the City's affirmative action policy. Therefore, the issue of whether that policy is constitutional is not properly before the Court." (J.A. 80.)

Before trial, the Respondent filed a motion in limine to exclude all evidence of the Affirmative Action Plan arguing that it was not relevant to the case. (J.A. 90-91, 144-46.) The Petitioner replied that the Affirmative Action Plan had been marked for evidence, but "would not be offered for evidence, unless at some point [it] become[s] independently relevant." (J.A. 146.) The court, therefore, granted the Respondent's motion in limine excluding the Affirmative Action Plan. (J.A. 149.) The Petitioner never offered the Affirmative Action Plan as evidence at trial.

On appeal, the Petitioner argued that the trial court should have admitted into evidence and considered the constitutionality of the Affirmative Action Plan. Although the Petitioner recognized that "there is no direct evidence" linking the Plan to this case, he argued that "McLean's management philosophy and actions . . . were completely consistent with and in keeping with the City's Affirmative Action Plan," such that a connection could be inferred. (*See* Appellant's Brief at 35-36.) The Court of Appeals panel unanimously rejected this argument. (App. 14-16, 20 n.1.) First, the court held that since there was no "nexus" between the Affirmative Action Plan and this case, and since on summary judgment all inferences must be drawn in favor of the non-moving party (the Respondent), the trial court properly denied the Petitioner's motion for summary judgment. (App. 14-15.) Second, the court held that the trial court did not

abuse its discretion in excluding evidence of the Affirmative Action Plan at trial. (App. 16.)

SUMMARY OF ARGUMENT

This case does not present a conflict among the Circuits or any important issue warranting a Writ of Certiorari. On the contrary, the Court of Appeals simply applied settled rules to the facts of this case and held unanimously that the Petitioner was not entitled to summary judgment and that the trial court did not abuse its discretion in excluding evidence of the Affirmative Action Plan.

REASONS THE WRIT SHOULD BE DENIED

I. THE COURT OF APPEALS HELD CORRECTLY THAT SINCE THE AFFIRMATIVE ACTION PLAN BORE NO NEXUS TO THIS CASE, THE PETITIONER WAS NOT ENTITLED TO SUMMARY JUDGMENT.

The lower courts did not evaluate the constitutionality of the Affirmative Action Plan because there is no evidence linking the Plan to the actions challenged in this case. (App. 15, 39.) The Court of Appeals held that even if one could infer that McLean acted pursuant to the Plan, such an inference would be improper at the summary judgment stage when all inferences must be drawn in favor of the non-moving party, i.e., the Respondent. "Accordingly, we must infer that McLean did not act

pursuant to the City's affirmative action plan. It is therefore unnecessary for us to determine the validity of the City's affirmative action plan as a matter of law. . . . " (App. 15.)

There is no evidence connecting the Affirmative Action Plan to this case in any way. McLean testified that she was unaware of any City goals for hiring women and minorities. (J.A. 826.) The Petitioner asserts that the Respondent "monitor[s] compliance with its Affirmative Action Plan." (Pet. for Writ of Cert. at 3.) On the contrary, there is no evidence in the record that the City has ever enforced the Plan in this or any case, much less monitored compliance with it.

Under 42 U.S.C. §§ 1981 and 1983, the Petitioner must prove that the challenged actions were taken pursuant to an official City policy. *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 735 (1989). The policy must actually inflict the injury; there must be a "direct causal link" between the policy and the alleged violation. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989). In other words, the policy must be the "moving force" behind the alleged violation. *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 694 (1978). Applying this well-established rule to the facts of this case, the lower courts properly and unanimously held that since the Affirmative Action Plan is totally unrelated to the challenged actions, it is not sufficient to sustain a § 1981 or § 1983 claim. (App. 14-15, 30-31, 39.) There is no conflict among the Circuits on this point.

Under Title VII, courts refuse to assess the validity of affirmative action plans where there is no evidence that the employer acted pursuant to the plan. *E.g., Cerrato v.*

San Francisco Comm. College Dist., 26 F.3d 968, 976 (9th Cir. 1994); *McQuillen v. Wisconsin Educ. Ass'n Council*, 830 F.2d 659, 666 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988); *Canham v. Oberlin College*, 666 F.2d 1057, 1061 (6th Cir. 1981), *cert. denied*, 456 U.S. 977 (1982). Research revealed no case in which the Court of Appeals for the District of Columbia Circuit examined an affirmative action plan without some nexus to the challenged actions. Neither of the cases cited by the Petitioner, *Bishopp v. District of Columbia*, 788 F.2d 781 (D.C. Cir. 1986), and *Lanphear v. Prokop*, 703 F.2d 1311 (D.C. Cir. 1983), evaluated the validity of an affirmative action plan. There is no conflict among the circuits on this point.

Furthermore, since the validity of the Respondent's Affirmative Action Plan was not at issue in the Petitioner's EEOC complaint or in the EEOC investigation, (J.A. 881-84), it may not be reviewed in this case. *E.g.*, *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995) (only issues included in the original complaint or "any charges that would naturally have arisen from an investigation thereof" may be raised in a subsequent Title VII suit).

II. THE COURT OF APPEALS HELD CORRECTLY THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF THE AFFIRMATIVE ACTION PLAN AT TRIAL.

The Petitioner did not apply for the Director of Communication Services position he claims he was denied on the basis of race. (J.A. 617-18.) To make out a prima facie case under Title VII, therefore, the Petitioner argues that

it would have been futile for him to apply. The Affirmative Action Plan, he contends, should have been admitted in support of his futility argument. (Pet. for Writ of Cert. at 16.) The Court of Appeals held that the District Court did not abuse its discretion in excluding evidence of the Affirmative Action Plan at trial. (App. 16.)

Relevancy determinations are within the discretion of the trial court and are not reversed absent an abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 517 (1997). In addition, any error in excluding the Affirmative Action Plan as evidence was harmless in light of the fact that the Petitioner did not apply for the Director of Communication Services job. *See* Fed. R. Civ. P. 61; Fed. R. Evid. 103(a); *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 606 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1820 (1997). Certainly, this evidentiary ruling does not warrant granting a Writ of Certiorari.

Moreover, the Petitioner never offered the Affirmative Action Plan as evidence. Federal Rule of Evidence 103(a)(2) requires the proponent of excluded evidence to make the substance of the evidence known to the trial court in order to preserve for appeal the argument that the evidence was wrongly excluded. *See, e.g., Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988). Since the Petitioner did not offer the Affirmative Action Plan as evidence or specify the substance of the evidence at trial, the Court should refuse to review the trial court's exclusion of the Affirmative Action Plan.

The Petitioner contends that the Fourth Circuit's decision here, along with decisions of the Sixth, Seventh, and Ninth Circuits, conflict with the decisions of the

District of Columbia Circuit in *Bishopp v. District of Columbia*, 788 F.2d 781 (D.C. Cir. 1986), and *Lanphear v. Prokop*, 703 F.2d 1311 (D.C. Cir. 1983). The Courts of Appeals in *Cerrato v. San Francisco Comm. College Dist.*, 26 F.3d 968, 976 (9th Cir. 1994), *McQuillen v. Wisconsin Educ. Ass'n Council*, 830 F.2d 659, 666 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988), and *Canham v. Oberlin College*, 666 F.2d 1057, 1061 (6th Cir. 1981), *cert. denied*, 456 U.S. 977 (1982), all declined to assess the validity of an affirmative action plan because there was no evidence that the employer acted pursuant to the plan.

Bishopp and *Lanphear* are not to the contrary. As is pointed out above, neither of these cases evaluated an affirmative action plan. Rather, in both cases, the district court recognized the existence of an affirmative action plan, *Bishopp*, 788 F.2d at 783; *Lanphear*, 703 F.2d at 1315, but held in favor of the employer, 788 F.2d at 782; 703 F.2d at 1312. No party in either case challenged the admissibility of the affirmative action plan as evidence. 788 F.2d at 783 n.2, 784 n.3; 703 F.2d at 1315 n.27. Consequently, the Court of Appeals did not address that issue in either case, but simply noted the affirmative action plan along with other evidence in reversing the district court. 788 F.2d at 787; 703 F.2d at 1315. Thus, *Bishopp* and *Lanphear* do not, as the Petitioner asserts, conflict with the Fourth Circuit's ruling in this case. (Pet. for Writ of Cert. at 16-17.)

Moreover, the affirmative action plan was linked to the challenged actions in both cases. In *Lanphear*, the plan currently being developed specifically required that a black man be hired for the plaintiff's job in the same year he sought reappointment. 703 F.2d at 1313. In addition,

the agency head was actively pressuring her subordinates to hire minorities at that time. *Id.* The plaintiff was "amply qualified," *id.* at 1315, and had received favorable evaluations, *id.* at 1312, but was not considered for the position and was passed over in favor of a black man whose qualifications were not fully reviewed, *id.* at 1315. These elements together made out a prima facie case of discrimination.

Likewise in *Bishopp*, the affirmative action plan was currently being developed, the hiring official was under pressure to promote a minority, and the Mayor and Fire Chief were both black. 788 F.2d at 787. In addition, the plaintiffs were more qualified than the black man who received the promotion "in an unprecedented fashion." *Id.* at 786. Again, these elements together made out a prima facie case of discrimination. In this case, by contrast, there is no evidence whatsoever linking the Affirmative Action Plan to the challenged actions. Therefore, *Bishopp* and *Lanphear* have no bearing here.

The Petitioner argues that proof of a discriminatory policy allows the inference that individual decisions were made pursuant to the policy. (Pet. for Writ of Cert. at 18-20.) The cases the Petitioner cites, however, are inapposite here. In *Franks v. Bowman Transp. Co, Inc.*, 424 U.S. 747 (1976), a class of blacks established that they were not hired because of their race. The issue was whether particular class members were entitled to retroactive seniority as part of their remedy. *Id.* at 750. This Court held that upon proof of a discriminatory pattern or practice as to the class as a whole, the Court would presume at the remedy stage that each individual class member was

entitled to relief beyond an injunction. *Id.* at 772. *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977), applied *Franks* in pattern or practice suits brought by the federal government.

The *Franks* presumption arises only in class action, pattern or practice cases and only at the remedial stage after the plaintiffs have proven that the policy, pattern, or practice at issue was discriminatory. All of the cases cited by the Petitioner fit in that category. This case does not. This is neither a class action nor a pattern or practice case. In fact, there is no evidence that the City has ever enforced the Affirmative Action Plan, much less established a pattern or practice of discrimination. Since the Petitioner never proved the elements of his claim, this case never reached the remedial stage. Thus, the *Franks* presumption is inapplicable here. Moreover, this Court in *Teamsters* refused to apply the *Franks* presumption to class members who had not applied for the job at issue, imposing the burden on the plaintiffs to prove their entitlement to relief. 431 U.S. at 371. Thus, the *Franks* presumption is not relevant here, in addition, because the Petitioner did not apply for the Director of Communication Services position.

CONCLUSION

Since this case does not present a conflict among the circuits or any important issue, but rather applies settled rules to the facts of this case, and for the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 98-1430

In The
Supreme Court of the United States

October Term 1998

RONALD A. BROWN,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. DID RESPONDENT BALTIMORE CITY'S AFFIRMATIVE ACTION PLAN, WHICH SETS EMPLOYMENT QUOTAS AND PREFERENCES FOR HIRING MINORITIES AND WOMEN IN UPPER LEVEL MANAGERIAL POSITIONS, WITHOUT A HISTORY OF PAST DISCRIMINATION, GIVE RISE TO A PRESUMPTION AND INFERENCE THAT IT WAS AN OFFICIAL REGULATION, CUSTOM, USAGE AND POLICY OF EMPLOYMENT DISCRIMINATION WITH IN THE MEANING OF 42 U.S.C. § 1981 AND § 1983, UNDER WHICH THE CITY COMPTROLLER ACTED, WHEN SHE PURGED WHITE MALES FROM UPPER LEVEL MANAGEMENT OF THE COMPTROLLER'S OFFICE OF BALTIMORE CITY IN ORDER TO EMPLOY MINORITIES AND WOMEN?

II. DID RESPONDENT BALTIMORE CITY'S AFFIRMATIVE ACTION PLAN, WHICH SETS EMPLOYMENT QUOTAS AND PREFERENCES FOR HIRING MINORITIES AND WOMEN IN UPPER LEVEL MANAGERIAL POSITIONS, WITHOUT A HISTORY OF PAST DISCRIMINATION, GIVE RISE TO A PRESUMPTION AND INFERENCE THAT IT WOULD BE A "FUTILE GESTURE" FOR THE PETITIONER, A WHITE MALE, TO REAPPLY FOR EMPLOYMENT, AFTER THE PETITIONER'S POSITION WAS ABOLISHED AND ELIMINATED FROM THE CITY BUDGET AND SIMULTANEOUSLY RE-CREATED IN SUBSTANTIALLY SIMILAR FORM, IN ORDER TO INCREASE THE NUMBER OF MINORITIES AND WOMEN?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

ARGUMENT 1

APPENDIX ..... R. App. i

ARGUMENT

Respondent's statement that the Petitioner failed to offer the affirmative action plan as evidence, after the Court granted the Motion In Limine, is incorrect. During the course of the trial proceedings on March 24, 1997, Petitioner offered for evidence those portions of the Respondent's Employee Handbook devoted to the affirmative action plans, marked as Plaintiff's Exhibit 12A, and the affirmative action plan documents themselves, marked as Plaintiff's Exhibits 12B, C and D.[1] The District Court sustained the Respondent's objection to the admission of these exhibits. (R.APP.1).[2]

Respondent incorrectly charges Petitioner with misrepresenting the facts of the case. The Petitioner's statement of facts is clearly in accord with the facts stated in Chief Judge Wilkinson's dissenting opinion, (APP. 20-27), as well as those in the majority opinion. (APP. 1-8, 10-12).

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[1] Plaintiff's Exhibit D is reproduced in the Appendix to the Petition for Writ of Certiorari (APP. 67-106).

[2] The transcript is set forth in a one-page appendix hereto. (JA 646-47; Tr. 577-78).

Respectfully submitted,

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TABLE OF CONTENTS
Appendix to Reply to Brief in Opposition

Reporter's Official
Transcript of Proceedings before
The Honorable William M. Nickerson,
United States District Court
for the District of Maryland
March 24, 1997 ..... R.App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RONALD BROWN,

Plaintiff,

vs.

MAYOR AND CITY COUNCIL
OF BALTIMORE,

Defendant.

Baltimore, Maryland
Civil Action No. WMN-95-387
March 24, 1997

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS
(TR. 577-578)

BEFORE:

THE HONORABLE WILLIAM M. NICKERSON

MR SCHULMAN: There is still a 1981 claim in the case, and in that view I am going to move Exhibits 12 A, 12 B, 12 C and 12 D. These are the affirmative action documents. 12 A being the city handbook. 12 B, 12 C, 12 D themselves being the actual plans.

I understand that the Court has ruled with regard to the 1983 action there has been no relationship between any plan that the city may have had and

the action taken in this case. I just point out to the Court but we are offering that at this time as part of our evidence.

MR. RUCKLE: Your Honor, I would object based on the issue of relevance. Again, this issue is not in before this Court and it has no probative value and it's highly prejudicial and it's not anything that has affected Mr. Brown's employment decisions.

THE COURT: The objection is sustained.